TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 56.

CHARLES P. CHOUTEAU, SURVIVING PARTNER OF THE FIRM OF CHOUTEAU, HARRISON AND VALLE, AND WILLIAM A. STEEL, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 16, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 56.

CHARLES P. CHOUTEAU, SURVIVING PARTNER OF THE FIRM OF CHOUTEAU, HARRISON AND VALLE, AND WILLIAM A. STEEL, APPELLANTS,

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition filed October 30, 1869	1	1
Traverse	8	5
Amended petition filed March 17, 1873	9	6
Amended petition filed November 24, 1873	21	12
Plea of limitation	35	20
Final judgment of the court	36	20
Application for allowance of appeal	37	21
Order allowing same	37	21
Finding of facts and conclusion of law	38	21
Opinion of the court	43	26
Certificate	48	30

1 U. S. Court of Claims, December term, 1868.

Petition.—Filed Oct. 30th, A. D. 1869.

CHARLES W. MCCORD, WHO SUES FOR THE use of William A. Steel, Charles P. Chouteau, James Harrison, and Jules Valle, vs. THE UNITED STATES. } No. 6084.

To the honorable the judges of the Court of Claims:

Your petitioner, Charles W. McCord, respectfully represents unto your honors that on the 9th day of July, A. D. 1863, petitioner entered into a contract with John Lenthall, Chief of the Bureau of Construction and Repair, acting in the name of the Secretary of the Navy, for and on behalf the United States, as follows, to wit:

CONTRACT FOR IRON-CLAD STEAM-BATTERY.

SEC. 1. This contract, made and entered into at the city of Saint Louis, in the State of Missouri, the ninth day of July, 1863, between Charles W. McCord, of the city of Saint Louis, in the State of Missouri, as principal, and George C. Bestor, of Peoria, Ill., Loring P. Sanger, of Joliet, Illinois, and James Harrison and Jules Valle, both of the city of St. Louis, State of Missouri, as sureties, and John Lenthall, Chief of the Bureau of Construction and Repair, acting in the name of the Secretary of the Navy, for and in behalf of the United States of America, of the second part, witnesseth:

SEC. 2. That in consideration of the payments hereinafter provided for, the party of the first part hereby contracts and agrees to construct one iron-clad steam-battery, of iron and wood combined, of the following general dimensions, viz: two hundred and twenty-five (225) feet extreme length, forty-five (45) feet extreme breadth of beam, and nine and one-twelfth (9 1-12) feet total depth from top of deck to bottom of lower vessel, according to the general plans and specifications furnished, which will form a part of this contract. The working drawings to be
2 made by the parties of the first part in conformity therewith to the satisfaction of the superintendent.

SEC. 3. The iron used in this vessel to be of the very best quality, and all to be full to the thicknesses.

SEC. 4. The engines, boilers, and appurtenances to be of the dimensions and kinds expressed in the specifications furnished. The engines shall be condensing-engines, without air-pumps. A distilling apparatus to be provided to supply the crew with potable water. The vessel and all the machinery to be built in a substantial manner, strong and durable in every detail, and every defect or breakage arising from imperfections in materials or workmanship for two months after trial-trip shall be repaired at the expense of the party of the first part.

SEC. 5. This battery to be completed and ready for service in eight months from the twenty-fourth (24) day of June, 1863, unless arrested by any contingency which human foresight could not avert, and the work on her shall progress in proportion to the time stipulated for her completion.

SEC. 6. And it is further agreed between the contracting parties that this battery shall be completely fitted and equipped in all respects for service, with the exception of the guns, fuel, ordnance stores, and nau-

tical instruments, to the satisfaction of the party of the second part; and the party of the first part warrant and guarantee the work conforming in all respects to the specifications, drawings, &c., furnished, which constitute a part of this contract, and are to govern the parties hereby contracting as truly as if the same were incorporated in this instrument; nor is the omission therein of any detail or object necessary to carry into effect the intent of this agreement to be to the detriment of the United States.

SEC. 7. All the materials and workmanship to be of the very best quality, and acceptable to the superintendent to be appointed on the part of the United States, who is hereby empowered to reject all or any portion of either in any stage of its progress, if, in his opinion, not of the quality above required; and the party of the first part will provide the superintendent and inspector suitable and convenient office-room, and afford them satisfactory facilities for superintending the work.

SEC. 8. For this battery, so completed and delivered at Cairo, Illinois, within the eight months stipulated, the party of the second part will pay to the party of the first part the sum of three hundred and eighty-six thousand dollars in eight payments in the following manner:

SEC. 9. When there shall have been furnished by the party of the first part materials and work done to the amount of forty-eight thousand two hundred and fifty dollars, and certified to by the superintendent on the part of the United States, the party of the second part agrees to pay the same to the said party of the first part, on bills properly
3 approved therefor, deducting and reserving twenty-five (25) per centum from each and every payment until after a satisfactory test and acceptance of said vessel.

SEC. 10. The party of the second part further agrees that, in addition to the price to be paid for the vessel, there will be paid to the party of the first part the additional sum of four thousand five hundred dollars ($4,500) per month for each and every month that the vessel may be delivered completed previous to the time stipulated; and the parties of the first part do hereby agree that for every month's delay beyond the time named for the delivery of the vessel there shall be a deduction of four thousand five hundred dollars ($4,500) per month from the sum of three hundred and eighty-six thousand dollars, before named as to be paid.

SEC. 11. It is further agreed, and mutually understood, that the last payment is not to be made until the vessel is delivered at the place appointed for the reception of the vessel by the Navy Department.

SEC. 12. And it is understood between the contracting parties that after the vessel shall be ready for sea and be taken possession of by the Government, such possession shall be regarded as accepting the vessel so far only as the quality of materials and workmanship are concerned, and not to affect the claim of the party of the second part for damage in case of default or failure to the party of the first part in not complying with all the provisions of this contract; and that the test of the vessel, as provided, shall be made as soon thereafter as practicable, not to exceed sixty (60) days, the reservation of twenty-five (25) per centum to be withheld until after the test shall have been made, and the payment thereof, or as much as may be due, shall be received by the parties of the first part in full consideration of the complete fulfilment of this contract.

SEC. 13. In case of default of all or any of the foregoing covenants and stipulations, the party of the first part hereby bind themselves, their heirs, exe utors, administrators, and assigns, by these presents, to

refund to the United States the amount of money advanced to them on said battery within thirty (30) days after such failure shall have been declared by the party of the second part; and the party of the first part, in case of failure in any of the points before stipulated, hereby acknowledge themselves indebted to the United States in liquidated damages to the full amount of the money advanced as aforesaid. The vessel to remain in the possession of the party of the second part, after the first payment, until all advances shall have been refunded, in case of failure to fulfil the contract by the party of the first part.

SEC. 14. It is further agreed that in case of failure or neglect on the part of the party of the first part to fulfil the stipulations of this contract and have the vessel delivered as above stipulated, that the Navy Department may, at its option, enter in and take possession of, and direct purchases to be made of all the necessary materials, and
4 cause the vessel to be completed and fully equipped as heretofore described; and any excess of cost will be at the expense of the said party of the first part, provided the delay has not been occasioned by the action of the Navy Department.

SEC. 15. The party of the first part does further engage and contract that no member of Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. And it is hereby expressly provided, and this contract is upon this express condition, that if any such member of Congress, officer of the Navy, or other person above named, shall be admitted to any share or part of this contract, or to any benefit to arise under it, or in case the party of the first part shall in any respect fail to perform this contract on their part, the same may be, at the option of the United States, declared null and void, without affecting their right to recover for defaults which may have occurred.

SEC. 16. It is further agreed that the parties of the second part shall have the privilege of making alterations and additions to the plans and specifications at any time during the progress of the work as they may deem necessary and proper; and if said alterations and additions shall cause extra expense to the parties of the first part, they will pay for the same at fair and reasonable rates; and should such changes cause less work and expense to the parties of the first part, a corresponding reduction to be made from the contract price, and in each case the cost of the alterations to be determined when the changes are directed to be made.

SEC. 17. It is further agreed that the Navy Department shall have a lien on the vessel and on all the materials provided for the fulfilment of this contract, for the money advanced or paid by the United States on account thereof; and the said parties of the first part agree that they will keep the vessel and materials, or as much of them as are exposed and liable to injury, insured against fire and flood to the amount which may be paid on account of this contract until delivered to the Navy Department, the policies being made payable to the United States.

SEC. 18. It is further agreed by the parties of the first part, as required by the 14th section of the act of Congress approved July 17, 1862, that neither this contract nor any interest therein shall be transferred to any other party or parties; and that any such transfer shall cause the annulment of the contract, as far as the United States are concerned; and that all rights of action are hereby reserved to the United States for any breach of this contract by the said parties of the first part.

SEC. 19. The payments shall be made to the said parties of the first

part, or to their order, by the navy-agent at New York, in the manner and to the extent provided, on bills in triplicate, duly certified and approved by the proper persons, within ten days after the warrants for the same shall have been passed by the Secretary of the Treasury.

5 (Signed) CHARLES W. McCORD. [SEAL.]
GEORGE C. BESTOR. [SEAL.]
LORING P. SANGER. [SEAL.]
JAMES HARRISON. [SEAL.]
JULES VALLE. [SEAL.]

Signed, sealed, and delivered in presence of—
(Signed) JNO. BOGGS.
LS. FURR.

I certify that I have made due and diligent personal inquiry as to the ability of the sureties in this contract, and am satisfied, from information derived from others, that they are good and sufficient for the sum of one hundred and fifty thousand dollars.

JOSEPH G. EASTON,
U. S. Marshal for the Eastern District of Missouri.

Petitioner further states that after such contract was executed he made a subcontract for the construction of said steam-battery with the firm of McCord & Co., (a firm in the iron-foundry and machine-building business, and of which firm petitioner was a member,) and William A. Steel, in which subcontract the said McCord & Co. had an interest of two-thirds, and the said Steel an interest of one-third in the original contract; that the said subcontractors proceeded diligently with the prosecution of said contract, and would have completed the same within the period designated in said original contract had they not been prevented by the orders of the Government officers as hereinafter stated; that the said subcontractors had brought the said contract nearly to completion, when petitioner was directed to suspend work on the said iron-clad steam-battery, for the purpose of making certain alterations in the construction thereof, and that thereafter the said Navy Department directed such alterations and additions to the plans and specifications contained in such original contract that the vessel so directed to be constructed was to be an iron-clad gunboat, with a depth of hold of ten feet eleven inches instead of the total depth of nine feet one inch from top of deck to bottom of lower vessel, as provided in the original specifications, whereby, and by reason of such alterations and additions so ordered, and which alterations and additions were made by said petitioner or the said subcontractors, your petitioner was put to the extra expense of four hundred and twenty-seven thousand three hundred and forty-five dollars and ninety-eight cents, ($427,345.98,)

6 which said extra expenses include the extra labor and materials rendered necessary by such alterations and changes, the cost of which said labor and materials by reason of the necessary and unavoidable delay occasioned by such changes and the orders emanating from the said Navy Department in relation to the same, and of the rapid increase of cost of the same during the period of such construction, greatly enhanced the said extra expense to the builders thereof.

Petitioner further states that when such changes were directed to be made the cost of the same were not determined between the said parties, but that such changes were made under the direction of the proper officer of the Government, and that after the same were made the said Navy Department paid to your petitioner the original contract price for

the building and equipping said vessel, to wit, $386,000, and the further sum of two hundred and three thousand four hundred and fifty-eight dollars and eighty-two cents, ($203,458.82,) on account of such alterations; but that although petitioner frequently demanded of the said Department of the Navy the said balance of $223,887.86, yet this latter sum has been refused to him, and which sum petitioner claims in this action.

Petitioner further states that he made application for relief to Congress; that the Senate passed a joint resolution referring this case to this court, which resolution was not acted upon in the House of Representatives.

Petitioner further states that since this claim originated the said McCord & Co. have gone into bankruptcy, and have been declared bankrupt by the United States district court of the eastern district of Missouri, and that their assignee has sold and transferred the said claim for the benefit of their creditors, to the said Chouteau, Harrison & Valle, whereby the said Chouteau, Harrison & Valle have become the equitable owners of two-thirds of said claim, and the said Steel as such subcontractor became the equitable owner of one-third thereof.

Petitioner further states that he and the said Reuben C. McCord and George W. Garrett, late members of the firm of McCord & Co., and the said William A. Steel, Charles P. Chouteau, James Harrison & Jules Valle, assignees as aforesaid, have each and every of them always borne true allegiance to the Government of the United States, and have not in any manner given aid, comfort, or assistance to the late rebellion against the said Government.

7 And, therefore, they ask judgment in the sum of two hundred and twenty-three thousand eight hundred and eighty-seven and 16-100 dollars still due upon said contract.

A. L. MERRIMAN AND
D. B. MARTIN,
Solicitors for Claimants.

STATE OF ILLINOIS,
County of Will, ss:

William A. Steel, one of the claimants, and for all the others, being duly sworn, says that no assignment of said claim, or any part thereof, except as stated in the petition, or any interest therein, has been made to any person; that said claimants have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said Government; that said claimants are justly entitled to the amount claimed against the United States of America, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

WILLIAM A. STEEL.

Sworn to and subscribed before me this 25th day of October, A. D. 1869.

[SEAL.] CONRAD TALGE,
Clerk Will Co. Cir. Court.

8 In the United States Court of Claims, December term, A. D. 1869.

CHARLES W. McCORD, FOR THE USE OF, &C., *vs.* THE UNITED STATES. } No. 6084.

And the said defendants, by their Attorney-General, come and make

answer to the petition of the claimants herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimants in the sum of two hundred and twenty-three thousand eight hundred and eighty-seven dollars and sixteen cents, the said defendants say that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOMAS H. TALBOT,
Assistant Attorney-General.

Filed Jan'y 7, 1870.

9 In the United States Court of Claims.

Amended petition.—Filed Mch 17, 1873.

CHARLES W. McCORD, FOR THE USE, &C., *vs.* THE UNITED STATES. } No. 0084.

Petitioner, Paul A. Fusz, administrator of the estate of Charles W. McCord, by way of amendment to the petition filed in this cause, saith:

That on the 9th day of July, A. D. 1863, the said Charles W. McCord entered into a contract with the United States for the construction of an iron-clad steam-battery, which contract is set out in the original petition filed in this cause.

Petitioner further avers that the said McCord & Co., subcontractors under the said Charles W. McCord, immediately after the execution of said contract proceeded with the construction of said vessel.

That were it not for the changes and alterations ordered and directed by the agents of the United States in said vessel, the said con would have completed the said vessel within the period stipulated in said contract for the completion thereof; but so it is, and petitioner alleges the fact to be, that soon after the execution of said contract and in the month of July, A. D. 1863, the agents of the United States
10 commenced the direction of changes and alterations in the plans and specifications of said contract, and from that period until the month of October, A. D. 1865, continued to direct the changes and alterations in the various parts of said vessel, and so frequent and material were the changes and alterations so ordered by the Government and made by said McCord, that it was impossible to complete the said vessel within the period of eight months from the 24th day of June, A. D. 1863, as he, the said McCord, had contracted to do.

Petitioner further states that in consequence of such frequent changes and alterations the Government failed to have in readiness the drawings, plans, and specifications for the construction of said steam-battery which were to have been furnished said McCord without delay, and which were necessary for the prosecution of said work, a large portion of which drawings were not furnished until long after the eight months from the date of such contract had expired, whereby said McCord was

hindered and delayed in the prosecution of said work; that once, about the 15th day of June, 1864, the United States, by its agents, directed all work to be suspended in said vessel until they should be able to make the necessary plans and specifications for the raising of the deck of said vessel twenty-two inches, which suspension continued for the space of three months, and petitioner states that by reason of such changes and alterations, and the delays said McCord was subjected to thereby, only one-fourth of said vessel was completed within the eight months stipulated in said contract for the completion of said vessel.

Petitioner further states that by reason of such changes and alterations which he, the said McCord, was required to make under the orders of the United States, as stipulated in said contract, the said McCord was put to great extra expense in the furnishing labor and materials over and above what was required under the original contract, which extra labor and material were worth, at fair and reasonable rates, the
11 sum of one hundred and seventy-two thousand nine hundred and forty-one dollars and seventy-three cents, and that on account of such changes and alterations, there was caused less work and material, to the value of three thousand eight hundred and eighty-two dollars and eighty cents; and that said McCord received from the United States on account of such extra work and materials the sum of one hundred and twelve thousand two hundred and twenty-eight dollars and twenty cents, and that there is still due and unpaid to your petitioner, on account thereof, the sum of fifty-six thousand eight hundred and thirty dollars and seventy-three cents.

Petitioner further states that the said McCord furnished to said United States, at its special instance and request, to be placed in said vessel, the gun-carriages needed therein, and which were not provided for in said contract, the fair and reasonable value of which gun-carriages was seven thousand five hundred dollars, upon which was paid the sum of three thousand four hundred dollars, leaving due and unpaid on said gun-carriages the sum of four thousand and one hundred dollars.

Petitioner further states that said McCord, in addition to the extra work aforementioned, also performed certain extra work, under special contracts, to wit, raising the hull of said vessel twenty-two inches, at the agreed price of eighty-two thousand five hundred dollars; for cross-floors and stiffening-plates in water compartments, five thousand dollars; for laying cross-floors on frames three hundred dollars, which said last-mentioned sums, amounting to eighty-seven thousand eight hundred dollars, have been paid, as also has the original contract price, to wit, three hundred and eighty-six thousand dollars.

Petitioner further states that the said changes and alterations, and consequent delay of the furnishing plans, drawings, and specifications, further caused an increased expense to said McCord in the increased cost of labor and materials necessary to complete said vessel
12 after the expiration of the eight months from the date of said contract, insurance, wages of laborers under pay when the work was suspended, use of ways and yard, and that the extra expense incurred by said McCord arising out of the enhanced cost of the labor and materials necessary for the work comprised within the said original contract, was fully the sum of one hundred and twenty-five thousand dollars.

Petitioner further states that the said vessel was completed and ready for delivery in the month of November, A. D. 1865, at the city of S't Louis, in the State of Missouri, where said vessel was con-

structed, but that said McCord was then unable to deliver the same a Cairo, Illinois, on account of the great draft of said vessel, which by reason of the greater weight occasioned by said changes and alterations had so increased over and above the draft contemplated in the original plans and specifications as to prevent the running of said vessel in the Mississippi River from S't Louis to Cairo, except during a high stage of water, and in consequence of such increased draft of said vessel the same was detained at S't Louis until the latter part of March, A. D. 1866, and that the increased expenses incurred by said McCord thereby were the sum of ten thousand dollars.

Petitioner further states that the Secretary of the Navy, under the act of Congress of 2d March, 1867, authorizing him to investigate the claims of contractors for building vessels of war and steam-machinery, &c., delegated such authority to a board of naval officers, with which board said McCord filed a statement of his claim, but that nothing was allowed to him either by said board or the Secretary, nor was any allowance reported by said board or the said Secretary, to Congress, in favor of said McCord.

Petitioner further states that Charles P. Chouteau, survivor of Charles P. Chouteau, James Harrison, and Jules Valle, is now, or claims to be, the equitable owner of the interest of said McCord in said
13 claim by virtue of certain proceedings in bankruptcy, and a sale of such claim, as will more fully appear by reference to the orders of said court of bankruptcy and the originals themselves herewith filed and prayed to be made parts hereof, marked as "Exhibits A and B." William A. Steel also claims an interest in said claim as partner of the firm of McCord & Co., subcontractors under said Charles W. McCord.

Wherefore petitioner claims judgment for the sum of one hundred and ninety-five thousand nine hundred and thirty dollars and seventy-three cents.

PAUL A. FUSZ,
Administrator of Charles W. McCord, deceased.

STATE OF MISSOURI,
City and County of S't Louis, ss:

Paul A. Fusz, being duly sworn, says that no assignment has been made of said claim, except as stated in the foregoing petition, or any interest therein; that claimant is justly entitled as administrator to the amount claimed against the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

PAUL A. FUSZ.

Subscribed and sworn to before me this third day of February, A. D. 1873.

[L. S.] J. S. GARLAND,
Notary Public S't Louis County, Mo.

14 A.—Form No. 18.

Assignment of bankrupt's effects.

In the district court of the United States for the eastern district of Missouri.

In the matter of Charles W. McCord and George H. Garrett, bankrupts. In bankruptcy.

Before Enos Clarke, register in bankruptcy.

EASTERN DISTRICT OF MISSOURI, *ss:*

Know all men by these presents that Leonard Wilcox, esq., of S't

Louis, in the county of S't Louis, and State of Missouri, has been duly appointed assignee in said matter.

Now, therefore, I, Enos Clarke, register in bankruptcy of said district, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, there being no opposing interest, do hereby convey and assign to said Leonard Wilcox, esq., assignee as aforesaid, all the estate, real and personal, of the said Charles W. McCord and George H. Garrett, bankrupts aforesaid, including all the property of whatever kind of which they are possessed, or in which they were interested or entitled to have on the 15th day of August, A. D. 1868, with all their deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said 14th section of said act:

To have and to hold all the foregoing premises to the said Leonard Wilcox and his heirs forever; in trust nevertheless for the use
15 and purposes, with the powers, and subject to the conditions and limitations set forth in said act.

In witness whereof I, the said register, have hereunto set my hand and caused the seal of said court to be affixed this 28th day of September, 1868.

[L. S.]

ENOS CLARKE,
Register in Bankruptcy.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United States, in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a true copy of the assignment in the matter of Charles W. McCord and George H. Garrett, bankrupts, in bankruptcy, as fully as the same remains on file and of record in said matter in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of S't Louis, in said district, this twentieth day of September, in the year of our Lord eighteen hundred and seventy-one.

[L. S.]

JOSEPH H. CLARK,
Clerk of said Court,
By WILLIAM R. WALKER,
Deputy Clerk.

B.

This indenture, made and entered into this 16th day of October, eighteen hundred and sixty-nine, by and between Leonard Wilcox, assignee of Charles W. McCord, bankrupt, party of the first part, and Charles P. Chouteau, James Harrison, and Jules Valle, composing the firm of Chouteau, Harrison & Valle, parties of the second part,
16 all of the city and county of S't Louis and State of Missouri, witnesseth, that whereas in a certain cause heretofore prosecuted in the district court of the United States for the eastern district of Missouri, entitled in the matter of Charles W. McCord and George H. Garrett, bankrupts, in bankruptcy, such proceedings were had, that on the 15th day of August, 1868, it was ordered as follows, to wit:

In the district court of the United States for the eastern district of Missouri.

IN THE MATTER OF CHARLES W. McCORD AND GEORGE H. GARRETT, A PETITIONER FOR ADJUDICATION IN BANKRUPTCY OF THEMSELVES.

In bankruptcy.

Eastern District of Missouri, ss:

Whereas Charles W. McCord and George H. Garrett, of the county of S't Louis, State of Missouri, and district aforesaid, have, on this 15th day of August, A. D. 1868, at one o'clock p. m., filed in the office of the clerk of said court a petition for adjudication in bankruptcy against themselves, according to the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867:" It is thereupon ordered that said petition be referred to Enos Clarke, esq., one of the registers in bankruptcy of this court, to make adjudication thereon, and take such other proceedings therein as are required by said act; and further, that the said Charles W. McCord and George H. Garrett shall, on or before the 26th day of August, A. D. 1868, inst., at 3 o'clock p. m., file with said register a duplicate copy of said petition and the schedules thereto annexed, and that they attend before said register on said day and thenceforth as said register may direct, to submit to such orders as may be made by said register or by this court relating to their said bankruptcy; and further, that until otherwise ordered by the court, the said register shall act upon the matters arising on this case at his office at the northwest corner of Third and Pine streets, S't Louis, at such time as he shall fix for that purpose.

17 Witness the honorable Samuel Treat, judge of the said court, and seal thereof, at S't Louis, in said district, on Saturday, the 15th day of August, A. D. 1868.

[L. S.] BENJ. F. HICKMAN,
Clerk of District Court of said District.

And whereas, in the proceedings had in said cases before the said Enos Clarke, on the 29th day of August, 1868, it was ordered as follows:

In the district court of the United States for the eastern district of Missouri, in the matter of Charles W. McCord and George H. Garrett, by whom a petition for adjudication of bankruptcy was filed on the 15th day of August, A. D. 1868, in said court, in bankruptcy, at S't Louis, in said district, on the 29th day of August, 1868, before Enos Clarke, one of the registers of said court in bankruptcy, I, the undersigned, a register of said court in bankruptcy, upon good proof before me, Enos Clarke, taken, do find that the said Charles W. McCord and George H. Garrett have become bankrupts within the time, intent, and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; and I do hereby declare and adjudge them bankrupts accordingly.

ENOS CLARKE,
Register in Bankruptcy.

And whereas such proceedings were had in said cause before Enos Clarke, register, that it was ordered as follows:

In the district court of the United States for the eastern district of

Missouri, in the matter of Charles W. McCord and George H. Garrett, bankrupts, in bankruptcy, eastern district of Missouri, *ss:* To Leonard Wilcox, esq., of S't Louis, in the county of S't Louis, and State of Missouri: I do certify that you were duly chosen assignee of the estate
18 and effects of the above-named bankrupts at the first meeting of the creditors on the 28th day of September, 1868, and I do hereby approve and confirm said election, and I do further certify that the greater part in number and value of the creditors of said bankrupts, who had proved their claims, were present or were duly represented at said meeting. Dated at S't Louis, the 28th day of September, A. D. 1868. Enos Clarke, register in bankruptcy. And whereas in the further proceedings had before the said register on the said 28th day of September, 1868, the assignment of the said bankrupts' estate was made to said assignee, which is as follows: In the district court of the United States for the eastern district of Missouri, in the matter of Charles W. McCord and George H. Garrett, bankrupts, in bankruptcy, eastern district of Missouri, *ss:* Know all men by these presents that Leonard Wilcox, of the city of S't Louis, in the county of S't Louis, and State of Missouri, has been duly appointed assignee in said matter: Now, therefore, I, Enos Clarke, register in bankruptcy of said district, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said Leonard Wilcox, assignee as aforesaid, all the estate, real and personal, of the said Charles W. McCord and George H. Garrett, bankrupts, aforesaid, including all the property of whatever kind of which they are possessed, or in which they were interested or entitled to have on the 15th day of August, A. D. 1868, with all their deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provision of said fourteenth section of said act: To have and to hold all the foregoing premises to the said Leonard Wilcox and his heirs forever. In trust, nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations, set forth n said act.
In witness whereof I, the said register, have hereunto set
19 my hand and caused the seal of said court to be affixed this 28th day of September, A. D. 1868. [L. S.] Enos Clarke, register in bankruptcy. And whereas, on the 7th day of May, 1869, it was ordered by said court as follows: In the district court of the United States for the eastern district of Missouri, in the matter of Charles W. McCord and George H. Garrett, bankrupts, in bankruptcy, eastern district of Missouri, at S't Louis, in said district, Friday, the 7th day of May, A. D. 1869, on the petition of Leonard Wilcox, assignee of the estate of said bankrupts this day filed herein. It is ordered by the court "that the choice heretofore made of the said Leonard Wilcox, as such assignee, and the assignment made to him herein, be, and the same are nunc pro tunc approved." And whereas there was belonging to the estate of said bankrupt, Charles W. McCord, on the 15th day of August, 1868, a certain claim against the United States Government for extra work performed and materials furnished to said Government by said Charles W. McCord in the building and construction of the iron-clad monitor Etlah, under a contract with said Government; and whereas all the right, title, and interest of whatsoever nature or kind, being in McCord, was by virtue of the assignment aforesaid vested in the said Leonard Wilcox; and whereas, in obedience to an order of said court of date September 21, 1869, the interest of said bankrupt in said claim,

amounting nominally to about one hundred and thirty-nine (139) thousand dollars, which was vested in said Wilcox, was sold by him at public auction, to the highest bidder for cash, on Wednesday, the 29th day of September, 1869, in the city of S't Louis, Missouri, and was struck off to the said parties of the second part at two hundred dollars, they being the highest bidders therefor; and whereas said sale was confirmed and approved by said court on petition of Leonard Wilcox aforesaid, by an order dated September 30, 1869: Now, therefore, this indenture
20 witnesseth, that the said party of the first , in consideration of the sum of two hundred dollars to him in hand paid, the receipt of which is hereby acknowledged by the said parties of the second part, hath and by these presents does convey, assign, and release unto the said parties of the second part, their heirs and assigns, all the title and interest vested in him as aforesaid in and to said claim, be it legal or equitable, with full power in the said parties of the second part to prosecute and collect the *second* claim; at their own risk and expense, however.

Witness my hand and seal the day and year first above written.

[SEAL.] LEONARD WILCOX,
Assignee of Charles W. McCord, Bankrupt.

[The words, "their heirs and assignees" and "in and to said claim," in the 4th and 5th lines of last page, inserted before signing.]

L. WILCOX, *Assignee.*

STATE OF MISSOURI,
County of S't Louis, ss:

Be it remembered that on the 16th day of October, A. D. 1869, before me, a notary public in and for the county and State aforesaid, came Leonard Wilcox, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as assignee of Charles W. McCord, bankrupt, as a party thereto and acknowledged the same to be his act and deed for the purposes therein mentioned.

Witness my hand and official seal hereto set, at office in said county, the day and year last above written.

[SEAL.] JAMES S. GARLAND,
Notary Public County S't Louis, Missouri.

21 In the United States Court of Claims.

CHARLES P. CHOUTEAU, SOLE SURVIVING partner of James Harrison and Jules Valle, of the late firm of "Chouteau, Harrison & Valle," and William A. Steel, vs. THE UNITED STATES.	No. 6084. Filed November 24, 1873.

The joint and several amended petition of Charles P. Chouteau, survivor, &c., and William A. Steel.

To the honorable the judges of the Court of Claims:

Your petitioners, Charles P. Chouteau, of S't Louis, Missouri, and William A. Steel, of Joliet, Illinois, file this their amended joint and several petition, by leave of the court first had and obtained, and thereby respectfully represent:

That since the filing of the original petition in this cause
22 Charles W. McCord, the nominal claimant, and James Harrison, and Jules Vallé, two of the persons for whose use said suit was brought, have departed this life; that your petitioner, Charles P. Chouteau, is the sole surviving partner of the late firm of Choutea', Harrison & Vallé, composed of your petitioner and the said James Harrison and Jules Vallé.

That on the 9th day of July, A. D. 1863, Charles W. McCord entered into a contract with John Lenthall, Chief of the Bureau of Construction and Repair, acting in the name of the Secretary of the Navy, for and in behalf of the United States, for the construction of an iron-clad steam-battery, which contract was in writing, a copy of which is hereto appended, marked "A," and made part of this amended petition.

That by the terms of said contract said steam-battery was to be completed on or before the 24th day of February, 1864.

That after the execution thereof, your petitioner, William A. Steel, became the owner of one-third interest in said contract, and from time to time, and at all times, advanced his means and furnished labor and materials, and used his credit, and devoted his time and energy to aid the said McCord, under the firm-name of McCord & Steel, in fulfilling his said contract with the United States, from the laying of the keel to the delivery to the Government; that by means thereof, and by his subcontractors and workmen, the said Charles W. McCord caused said work to be prosecuted with due diligence in all things; that he and they made all the preparations necessary to build said battery at S't Louis, Missouri, according to the specifications, and within the time required in said contract, and were then and there in all things ready and able to fulfill said contract and complete the said battery, and deliver the same, as provided in said contract, on or before the said 24th day of February, 1864; and that he, the said
23 contractor, with the aid of your petitioner, William A. Steel, and by his subcontractors and workmen, would have completed the same by the time above mentioned, according to the terms of said contract, but for the hindrances and preventions hereinafter mentioned; and in this behalf your petitioners represent that by the terms of said contract, in view of the fact that iron-clad steam-batteries were a novel experiment in naval construction and warfare, the United States reserved the right, from time to time, to make changes, additions, and alterations in the construction of the same, although it was not then contemplated that such alterations or additions would delay the completion of said vessel beyond the period named in the contract for the completion thereof; that the general plans and specifications furnished, and which formed a part of the said contract, were drawn by the officers of the Government in charge of this contract, in the month of April, 1863, and before the execution of said contract; but the same were kept in the office of the chief engineer, and were not transmitted to said McCord until after he had entered upon the performance of his said contract at S't Louis aforesaid; that after such drawings and specifications as were attached to and made part of such contract were made, and before the execution thereof, several important and material changes were made therein; and after the execution thereof, and during the whole period of eight months after the 24th day of June, 1863, said plans, drawings, and specifications were by the direction of the officers of the United States in charge thereof, and by its authority, frequently and materially changed, and the drawings necessary for such work withheld by such officers for the purpose of making such changes,

and that such changes were so great and material that they necessarily delayed and hindered the work on said steam-battery, and prevented said McCord and his subcontractors and workmen from completing said battery within the period specified; that without any fault or neglect on his or their part, it became and was impossible for him or them to perform and complete the same within the time specified; that such hindrances and preventions were wholly without his or their fault, and were the necessary result of the said acts of the said officers and agents of the United States, lawfully acting in its name and by its authority; that by means thereof, and without any fault or neglect on the part of said contractor, or of the said William A. Steel or his subcontractors, about one-fourth only of said steam-battery was done and furnished at the expiration of the period specified in said contract, to wit, on the 24th of February, 1864.

Your petitioners further aver that after the expiration of said period, the price of labor and materials became enhanced in value very rapidly, and that the cost and expense of such labor and materials necessary to complete said original undertaking was, by reason of such delays beyond said period fixed in said contract, increased from fifty to seventy per cent.; that under the directions of the said officers of the United States, the said contractor, with the said William A. Steel and their subcontractors and workmen, diligently prosecuted the said work, and furnishing all the labor and materials therefor, finished and completed the said steam-battery to the satisfaction and acceptance of the officers of the United States in charge, in November, A. D. 1865, which was as rapidly as the same could be done; that by the reason of the said delay, caused, as aforesaid, by the United States, and by reason of the advance in the prices of labor and materials, as above set out, the said contractor and the said William A. Steel were compelled and did pay and expend in and about the work, and in furnishing the materials required to be done and furnished under said contract, the sum of $125,000 over and above what they would have been obliged to pay had there been no hindrance or delay by the United States, as above set out, and had the work been done and the materials been furnished as they might, and, but for such hindrances, would have been, during the period fixed by said contract, ending February 24, 1864; that said sum of $125,000 was a fair and reasonable charge for the said advance in price of the work and materials done and furnished subsequent to the said 24th day of February, 1864, in the completion of said vessel, over and above the price agreed upon in said contract, and that no part of said sum of $125,000 has been paid, but remains justly due and wholly unpaid.

And your petitioners further show that, under the terms of said contract, the United States, from time to time, made alterations and additions to said steam-battery, thereby causing extra labor and extra materials and extra expense to the contractor; that the extra cost of two of such alterations was agreed upon at the time they were directed to be made, to wit: for the raising of the deck of the vessel twenty-two inches, the price agreed upon and paid was $82,500; for making two series of cross-floors, the extra cost agreed upon and paid was $5,300—in all, $87,800.

But your petitioners further show that there were a large number of alterations and additions—some very material and important, others less material and more minute—requiring a large amount of extra work and material in all parts of the steam-battery, which alterations and additions were made under the direction of the officers of the United

States in charge when the extra cost of such work and material was not agreed upon.

There were extra gun-carriages furnished by the contractor, at an actual cost to him, at a fair price of labor and materials, of..... $7,500
Upon which there was paid only the sum of..... 3,400

Leaving a balance of..... $4,100

26 That the entire amount of the extra cost of the work and materials done and furnished upon all the other alterations and additions not agreed upon, but done and furnished by the direction of the officers of the United States in charge thereof, amounted to the sum of $172,273.55; that upon that amount there was paid the sum of $112,258.82; that by means of the said changes and alterations made upon said steam-battery there was a diminution of work and materials to the amount of $3,852.18.

And your petitioners further show that the whole amount of their claim upon the United States, beyond the original contract price which was paid, may be stated as follows:

Extra cost beyond what it ought and would have cost, by reason of delay in building the ship, caused by the United States, as above set out		$125,000 00
For extra work not specified in the contract, the price of which was agreed upon		87,800 00
Cost of gun-carriages		7,500 00
Cost of extra work and materials for all other alterations and additions, price not agreed upon		172,273 55
Total		$392,573 55
Credit by payment on extra work and materials as agreed upon	$87,800 00	
Upon the extra work and materials not agreed upon	112,258 82	
On gun-carriages	3,400 00	
By diminution as above stated	3,852 18	
		207,311 00
Total balance unpaid		$185,262 55

27 Your petitioners further aver that the said firm of Chouteau, Harrison & Valle, were creditors to a large amount of the said Charles W. McCord and his subcontractor, for iron and materials furnished from time to time for the construction of said steam-battery.

That the said Charles W. McCord having become insolvent by means of his not receiving the amount justly due him as above set forth, on the 29th day of August, A. D. 1868, was declared and decreed a bankrupt by the district court of the United States for the eastern district of Missouri; that on the 28th day of September, A. D. 1868, Leonard Wilcox was duly appointed by said court assignee in bankruptcy of said Charles W. McCord, as appears by a certified copy of the order of said court filed in this cause, and to which reference is herein had for greater certainty, whereby he became and was vested with the full legal title of the said Charles W. McCord to the aforesaid claim against the United States; that on the 16th day of October, A. D. 1869, said Wilcox, as such assignee, sold, assigned, and conveyed all of the said claim to your petitioners, Charles P. Chouteau, James Harrison, and Jules

Valle, by his deed which was duly confirmed by the said court, as also appears by a certified copy of said orders in bankruptcy and the originals also on file in this cause, and of record therein; that by means thereof the said claim became and was wholly vested at law in said "Chouteau, Harrison & Valle," of which said firm your petitioner, Charles P. Chouteau, as above alleged, is the sole surviving partner.

And your petitioners further show that, although a question might arise, as between themselves, whether, by virtue of said decree and assignment in bankruptcy of said McCord, and the assignment to said Chouteau, Harrison, and Valle, your petitioner, Charles P. Chouteau, might not appear to be the sole owner at law of the whole interest in said claim, yet
28 in order to avoid that, they state and aver that fact to be, as was alleged in the original petition of the said Charles W. McCord, filed in this cause in his life-time, that the said William A. Steel, during the performance of said contract to build said steam-battery, and before the bankruptcy of said Charles W. McCord, became an equitable owner of the one-third interest in said contract, with said Charles W. McCord, and was, and still is, and ever has been the equitable owner of the one-third part of the said claim against the United States herein set out; and your petitioner, Charles P. Chouteau, hereby upon the record, admits and avers, that the said petitioner, William A. Steel, is in equity the joint owner of the said claim, and he hereby consents and asks that such interest may be protected in the said Steel in whatever judgment may be rendered herein in favor of your petitioners jointly, or in favor of your petitioner, Charles P. Chouteau, survivor, etc., for his own use two-thirds thereof, and to the use of the said William A. Steel to one-third thereof, or in such other form as shall conform to the rulings of this honorable court, and shall be agreeable to justice and equity, this being a question as between your petitioners only.

Wherefore your petitioners ask judgment against the United States in the sum of $185,262.55.

CHAS. P. CHOUTEAU.
WILLIAM A. STEEL.

A. L. MERRIMAN,
Of Washington, D. C., Attorney.
J. R. DOOLITTLE,
Of Counsel.

STATE OF MISSOURI, CITY AND COUNTY OF S'T LOUIS,
Eastern District of Missouri, ss:

Charles P. Chouteau and William A. Steel, being duly and severally sworn, each for himself says that no assignment of said claim,
29 or any part thereof, except as stated in the foregoing petition, has been made; that the said Charles W. McCord, Charles P. Chouteau, William A. Steel, and each and all the members of the said firm of Chouteau, Harrison & Valle, and all the subcontractors and the said Charles W. McCord, have borne true allegiance to the United States, and that said claimants are justly entitled to the amount claimed in said petition, after allowing all just credits and offsets, and that he believes the facts as stated in the above petition subscribed by them are true.

CHARLES P. CHOUTEAU.
WILLIAM A. STEEL.

Subscribed and sworn to before me this 13th day of November, A. D. 1673.

H. C. GEISBERG,
Commissioner U. S. Circuit Court,
Eastern District of Missouri.

Appendix marked "A."—Contract for iron-clad steam-battery.

SEC. 1. This contract, made and entered into at the city of Saint Louis, in the State of Missouri, the 9th day of July, 1863, between Charles W. McCord, of the city of Saint Louis, in the State of Missouri, as principal, and George C. Bestor, of Peoria, Illinois; Loring P. Sanger, of Joliet, Illinois, and James Harrison and Jules Valle, both of the city of S't Louis, State of Missouri, as sureties; and John Lenthall, Chief of the Bureau of Construction and Repair, acting in the name of the Secretary of the Navy, for and in behalf of the United States of America, of the second part, witnesseth:

SEC. 2. That in consideration of the payments hereinafter provided for, the party of the first part hereby contracts and agrees to construct one iron-clad steam-battery of iron and wood combined, of the following general dimensions, viz: two hundred and twenty-five (225) feet extreme length, forty-five (45) feet extreme breadth of beam, and nine and one-twelfth (9 1-12th) feet total depth from top of deck to bottom of lower vessel, according to the general plans and speci fi at s furnished, which will form a part of this contract; the working drawings to be made by the parties of the first part in conformity therewith, to the satisfaction of the superintendent.

SEC. 3. The iron used in this vessel to be of the very best quality, and all to be full to the thicknesses.

SEC. 4. The engines, boilers, and appurtenances to be of the dimensions and kinds expressed in the specifications furnished. The engines shall be condensing-engines without air-pumps; a distilling apparatus to be provided to supply the crew with portable water. The vessel and all the machinery to be built in a substantial manner, strong and durable in every detail, and every defect or breakage arising from imperfections in materials or workmanship for two months after trial-trip shall be repaired at the expense of the party of the first part.

SEC. 5. This battery to be completed and ready for service in eight months from the twenty-fourth (24th) day of June, 1863, unless arrested by any contingency which human foresight could not avert, and the work on her shall progress in proportion to the time stipulated for her completion.

SEC. 6. And it is further agreed between the contracting parties that this battery shall be completely fitted and equipped in all respects for service, with the exception of the guns, fuel, ordnance-stores, and nautical instruments, to the satisfaction of the party of the second part; and the party of the first part warrant and guarantee the work conforming in all respects to the specifications, drawings, &c., furnished, which constitute a part of this contract, and are to govern the parties hereby contracting as truly as if the same were incorporated in this instrument; nor is the omission therein of any detail or object necessary to carry into effect the intent of this agreement to be to the detriment of the United States.

SEC. 7. All the materials and workmanship to be of the very best quality, and acceptable to the superintendent to be appointed on the part of the United States, who is hereby empowered to re e t all or any

portion of either in any stage of its progress, if, in his opinion, not of the quality above required; and the party of the first part will
31 provide the superintendent and inspector suitable and convenient office-room, and afford them satisfactory facilities for superintending the work.

SEC. 8. For this battery, so completed and delivered at Cairo, Illinois, within the eight months stipulated, the party of the second part will pay to the party of the first part the sum of three hundred and eighty-six thousand dollars, in eight payments, in the following manner:

SEC. 9. When there shall have been furnished by the party of the first part materials and work done to the amount of forty-eight thousand two hundred and fifty dollars, and certified to by the superintendent on the part of the United States, the party of the second part agrees to pay the same to the said part*r* of the first part, on bills properly approved therefor, deducting and reserving twenty-five (25) per centum from each and every payment until after a satisfactory test and acceptance of said vessel.

SEC. 10. The party of the second part further agrees that, in addition to the price to be paid for the vessel, there will be paid to the party of the first part the additional sum of four thousand five hundred dollars ($4,500) per month for each and every month that the vessel may be delivered completed previous to the time stipulated; and the parties of the first part do hereby agree that for every month's delay beyond the time named for the delivery of the vessel there shall be a deduction of four thousand five hundred dollars ($4,500) per month from the sum of three hundred and eighty-six thousand dollars, before named as to be paid.

SEC. 11. It is further agreed, and mutually understood, that the last payment is not to be made until the vessel is delivered at the place appointed for the reception of the vessel by the Navy Department.

SEC. 12. And it is understood between the contracting parties that after the vessel shall be ready for sea and be taken possession of by the Government such possession shall be regarded as accepting the vessel so far only as the quality of materials and workmanship are concerned, and not to affect the claim of the party of the second part for damage in case of default or failure to the party of the first part in not complying with all the provisions of this contract; and that the test of the vessel, as provided, shall be made as soon thereafter as practicable, not to exceed sixty (60) days, the reservation of twenty-five (25)
32 per centum to be withheld until after the test shall have been made, and the payment thereof, or as much as may be due, shall be received by the parties of the first part in full consideration of the complete fulfilment of this contract.

SEC. 13. In case of default of all or any of the foregoing covenants and stipulations, the party of the first part hereby bind themselves, their heirs, executors, administrators, and assigns, by these presents, to refund to the United States the amount of money advanced to them on said battery within (30) days after such failure shall have been declared by the party of the second part; and the party of the first part, in case of failure in any of the points before stipulated, hereby acknowledge themselves indebted to the United States in liquidated damages to the full amount of the money advanced as aforesaid. The vessel to remain in the possession of the party of the second part, after the first payment, until all advances shall have been refunded, in case of failure to fulfil the contract by the party of the first part.

SEC. 14. It is further agreed that in case of failure or neglect on the

part of the party of the first part to fulfil the stipulations of this contract and have the vessel delivered as above stipulated, that the Navy Department may, at its option, enter in and take possession of, and direct purchases to be made of all the necessary materials, and cause the vessel to be completed and fully equipped as heretofore described; and any excess of cost will be at the expense of the said party of the first part, provided the delay has not been occasioned by the action of the Navy Department.

SEC. 15. The party of the first part does further engage and contract that no member of Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. And it is hereby expressly provided, and this contract is upon this express condition, that if any such member of Congress, officer of the Navy, or other person above named, shall be admitted to any share or part of this contract, or to any benefit to arise under it, or in case the party of the first part shall in any respect fail to perform this contract on their part, the same may be, at the option of the United States, declared null and void, without affecting their right to recover for defaults which may have occurred.

33 SEC. 16. It is further agreed that the parties of the second part shall have the privilege of making alterations and additions to the plans and specifications at any time during the progress of the work as they may deem necessary and proper; and if said alterations and additions shall cause extra expense to the parties of the first part, they will pay for the same at fair and reasonable rates; and should such changes cause less work and expense to the parties of the first part, a corresponding reduction to be made from the contract price, and in each case the cost of the alterations to be determined when the changes are directed to be made.

SEC. 17. It is further agreed that the Navy Department shall have a lien on the vessel and on all the materials provided for the fulfillment of this contract, for the money advanced or paid by the United States on account thereof; and the said parties of the first part agree that they will keep the vessel and materials, or as much of them as are exposed and liable to injury, insured against fire and flood to the amount which may be paid on account of this contract until delivered to the Navy Department, the policies being made payable to the United States.

SEC. 18. It is further agreed by the parties of the first part, as required by the 14th section of the act of Congress, approved July 17, 1862, that neither this contract nor any interest therein shall be transferred to any other party or parties, and that any such transfer shall cause the annulment of the contract, as far as the United States are concerned; and that all rights of action are hereby reserved to the United States for any breach of this contract by the said parties of the first part.

SEC. 19. The payments shall be made to the said parties of the first part, or to their order, by the navy-agent at New York, in the manner and to the extent provided on bills in triplicate, duly certified and ap-

proved by the proper persons, within ten days after the warrants for the same shall have been passed by the Secretary of the Treasury.

(Signed) CHARLES W. McCORD. [SEAL.]
GEORGE C. BESTOR. [SEAL.]
LORING P. SANGER. [SEAL.]
JAMES HARRISON. [SEAL.]
JULES VALLE. [SEAL.]

34 Signed, sealed, and delivered in presence of—
(Signed) JNO. BOGGS.
LS. FURR.

I certify that I have made due and diligent personal inquiry as the ability of the sureties in this contract, and am satisfied, from information derived from others, that they are good and sufficient for the sum of one hundred and fifty thousand dollars.

JOSEPH G. EASTON,
U. S. Marshal for the Eastern District of Missouri.

35 In the Court of Claims of the United States, December term, 1873.

CHARLES P. CHOUTEAU, SURV'G PARTNER, &C., & Wm. H. Steel,
vs.
THE UNITED STATES. } No. 6084.

Plea.

Now come the defendants, by their Attorney-General, and say that the claimants herein should not further have or maintain their suit against the defendants for the reason that the petition of the claimants was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
Assistant Attorney-General.

Filed Dec. 5, 1873.

(Indorsed:) No. . Court of Claims. vs. The United States. Plea. Assistant Attorney-General. Filed , 187 .

36 In the Court of Claims.

CHARLES P. CHOUTEAU, SURVIVING PARTNER of the firm of Chouteau, Harrison and Valle, and William A. Steel,
vs.
THE UNITED STATES. } 6084.

At a Court of Claims held at the Capitol, in the city of Washington, the fifteenth day of December, A. D. 1873, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

37 In the Court of Claims of the United States.

CHARLES P. CHOUTEAU AND OTHERS
vs.
THE UNITED STATES. } No. 6084.

The claimants move the court for an appeal in said cause to the Supreme Court of the United States from the judgment rendered herein.

A. L. MERRIMAN,
Att'y for Claimants.

Filed March 3, 1874.

Ordered, that the appeal be allowed as prayed for.
By the court.
MARCH 3, 1874.

38 United States Court of Claims.

CHARLES P. CHOUTEAU
vs.
THE UNITED STATES ET AL.

FACTS.

In this case the original petition was brought by Charles W. McCord for the use of William A. Steel, and Charles P. Chouteau, James Harrison, and Jules Valle.

In February, 1873, an amendment of the petition was filed by Paul Fusz, administrator of Charles W. McCord, stating that Charles P. Chouteau, survivor of Charles P. Chouteau, James Harrison, and Jules Valle, was, or claimed to be, the equitable owner of the interest of said McCord in the claim and by virtue of certain proceedings and a sale of such claim in bankruptcy.

At the hearing of the case a question was made whether the suit was prosecuted by the proper parties, and it was arranged that the petition might be amended so as to present the parties, the counsel for the claimant considered proper, and on this understanding the case was heard on its merits.

Since the hearing the proposed amendment has been filed. It states the death of Charles W. McCord, James Harrison, and Jules Valle, and presents as petitioners Charles P. Chouteau, surviving partner of the firm of Chouteau, Harrison, Valle, and William A. Steel.

The petitioners claim under a contract made on the 9th of July, 1863, between the United States and Charles W. McCord, for the construction at Saint Louis, in the State of Missouri, of an iron-clad steam-battery called the Etlah, and they specify their claims as follows, viz:

1st. For the balance due on extra work and materials, viz:

Gun-carriages	$4,100 00
Other extra work and materials, less $3,882.80 for diminution of work on the original contract	56,131 93
2d. For increase of cost of the main body of the vessel by reason of the long delay caused by the Government, during which the cost of labor and material was greatly enhanced	125,000 00
Extra insurance	2,400 00
Extra cost of guarding the ship against ice-gorge, &c	2,812 88
Total claim	190,444 81

And the court find the facts to be:

That the contract hereto annexed, and marked "A," was made between the United States and Charles W. McCord.

That the vessel specified in said contract was built and completed at Saint Louis, Mo., in November, 1865, by the said Charles W.
39 McCord, and has been accepted, and the contract-price therefor paid by the United States.

The completion of the vessel within the time specified in said contract was prevented by changes and alterations from her original plan and its specifications, made by the United States, and was thus delayed till November, 1865.

These changes and alterations extended from July, 1863, to near the time of the completion of the vessel; and from the 15th of June, 1864, to September 19, 1864, the work upon the vessel was substantially suspended for the purpose of increasing her depth, and making the other changes incident to that.

These changes and alterations increased the size, weight, and draught of the vessel, and the amount of materials and labor required for her construction; and during the various delays above stated the prices of labor and materials increased, and skilled labor became difficult to be procured at Saint Louis, because men were drafted into military service, or left the locality to avoid being drafted.

From these circumstances the work required and done under the original contract was enhanced in cost to the contractor $122,166 beyond the contract price, less deductions for labor and materials saved by changes and alterations, $3,882.80, leaving a balance for increased cost of work required by the contract of $118,283.20.

And from the same circumstances the cost to the contractors of the extra materials and labor on the vessel required by the changes and alterations made, exclusive of special contracts paid, were $172,273.55, of which $116,111 were paid, leaving a balance for extra material and labor of $56,162.55.

The gun-carriages for one Dahlgren gun and a 150-pounder gun contemplated by the original contract were, by order of the United States, changed into an arrangement of gun-carriages for 11-inch Dahlgren guns, which carriages cost contractor $7,500.

The alterations and changes from the original plan and specifications for the construction of the Etlah, made by the United States and hereinbefore referred to, were incident to the novelty of the undertaking, and were from time to time suggested by the experience of iron-clads under fire in the naval service, and they were made by the United States without unnecessary delay.

The hull of the Etlah was built at the ship-yard of McCord, Steel & Buton, and the men employed there were paid by their clerk and sometimes by Mr. Steel.

Other parts of the work were done at various places, and the iron-works at McCord & Company's iron-works and other places in and about Saint Louis; some of it at Buffalo, Cincinnati, and Carondelet.

Iron for the Etlah, ordered by Charles W. McCord and sometimes by Mr. Steel, was furnished by Chouteau, Harrison and Valle; some of it was in the first place charged to McCord, Sanger & Steel, and then to McCord & Company, to the amount of $109,000 to $110,000, which was paid by McCord & Company, except a balance of $11,725.48, for which McCord & Company gave their notes.

From the increased draught of the vessel beyond that contemplated in the original contract, and consequent upon the alterations and

changes made in her construction, she was detained after her completion and test at Saint Louis by a want of water in the river to float her to Cairo. The evidence did not show how long she was detained, and no evidence was offered to show the cost of or the amount paid for her insurance or protection at Saint Louis, or her removal to Cairo.

40 The said Charles McCord, by his attorneys, Gilman, Son & Company, duly appointed, signed and delivered to the United States the receipts hereto annexed, and marked "A" and "B," respectively:

A.

(In triplicate.)

"ETLAH.—PAYMENT ON ACCOUNT OF EXTRAS.

"NEW YORK, *April* 24, 1866.

"*U. S. Navy Department to Charles W. McCord, D'r.*

"(Appropriation: 'Const'n & Repair.')

For work done to the light-draft monitor Etlah, which is extra to the contract dated June 24th, 1863, being the full and final payment on all extras, and in full for all claims and demands for that work		$31,114 00
Less amount paid E. W. Barstow & Son, as per order	605 65	
Outfits and equipments called for by the contract, but not furnished	3,852 18	
		4,457 83
		$26,653 17

"I certify that the materials and labor which are extra to the contract dated June 24, 1863, put upon the vessel Etlah, built by Charles W. McCord, amount in value to $116,111.00, (certificates having been previously given for $85,000.00,) and they are according to directions which have been given from time to time.

"ROBERT DANBY,
"*General Inspector Steam-Machinery for the Navy.*

"Approved:

"F. H. GREGORY,
"*Rear-Admiral, Superintending.*

"NAVY DEPARTMENT,
"BUREAU 'CONSTRUCTION,' &C.,
"*April* 26, 1866.

"$26,653.17.]

"Approved in triplicate for twenty-six thousand six hundred & fifty-three dollars and seventeen cents, payable by the paymaster at New York.

"JOHN LENTHALL,
"*Chief of Bureau.*

41 "PAYMASTER'S OFFICE, U. S. NAVY,
"29 *Broadway, New York, May* 11, 1866.

"Received of J. C. Eldredge, paymaster, twenty-six thousand six hundred and fifty-three $\frac{17}{100}$ dollars, in full of the within bill, and have signed duplicate receipts.

$26,653.17.] "CHA'S W. McCORD,
"Per GILMAN, SON & CO., *Att'ys.*

"1887. 21519 B_2.

"I certify that the above is a true copy of the voucher on file in this office.

"S. J. W. TABOR, *Auditor.*

"4TH AUDITOR'S OFFICE, *July 24th*, 1873."

B.

"*The U. S. Navy Department, Bureau of Construction and Repair, to Cha's W. McCord, Dr.*

"(App'n: 'Construction & repair.')

1866.

Nov. 20.	To 2 gun-carriages, less those contracted for for the light-draft monitor Etlah.....	3,400 00
	Ordered paid by the Department, in conformity with the report of a board of officers of Nov'r 20th, 1868, approved by it.....	$3,400 00

"NAVY DEPARTMENT,
"BUREAU OF CONSTRUCTION AND REPAIR,
"$3,400.00.] "*Dec'r* 17, 1866.

"Approved in triplicate for three thousand and four hundred dollars and cents, payable by the paymaster at New York.

"JOHN LENTHALL,
"*Chief of the Bureau.*

"Received, New York, Jan'y 23, 1867, of J. C. Eldredge, paymaster, the sum of thirty-four hundred dollars, in full of the within bill.

$3,400.] "CHA'S W. McCORD,
"Per GILMAN, SON & CO., *Att'ys.*

"I certify that the above is a true copy of the original on file in this office.

"S. J. W. TABOR, *Auditor.*

"4TH AUDITOR'S OFFICE, *July 24th*, 1873.

"1042. 21519 B_2."

The said receipts were signed by Gilman, Son & Company as attorneys for Charles W. McCord, under the power of attorney hereto annexed, and marked "1" and "2," respectively.

"*Power of attorney.*

"Know all men by these presents that I, Charles W. McCord, of Saint Louis, in the State of Missouri, have made, constituted, and appointed,

and by these presents do make, constitute, and appoint Gilman, Son & Co., or either member of said firm, in the city of New York, my true and lawful attorney, for me and in my name, place, and stead, to collect from the navy-agent or authorized officer of the United States
42 Government, all payments due or to become due to me for building an iron-clad vessel at Saint Louis, Missouri, named the Etlah, as per contract dated 24 June, 1863, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

"In witness whereof I have hereunto set my hand and seal the 24 day of November, in the year one thousand eight hundred and sixty-three.

"CHARLES W. McCORD. [SEAL.]

"Sealed and delivered in the presence of—

"THO'S L. THORNELL.

"STATE OF NEW YORK,
County of New York, ss:

"Be it known that, on the twenty-fourth day of November, one thousand eight hundred and sixty-three, before me, a notary public in and for the State of New York, duly commissioned and sworn, dwelling in the city of New York, personally came Charles W. McCord and acknowledged the above letter of attorney to be his act and deed.

"In testimony whereof I have hereunto subscribed my name and affixed my seal of office the day and year last above written.

"THOMAS L. THORNELL,
"*Notary Public.*

"*Power of attorney.*

[Internal-revenue stamp, 1 dollar.]

"Know all men by these presents that Charles W. McCord, of the city of Saint Louis, and State of Missouri, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Messrs. Gilman, Son & Co., of the city of New York, my true and lawful attorney, for me and in my name, and for my use, to ask, demand, sue for, recover, and receive all such sum or sums of money, debts, goods, wares, and other demands whatsoever which are or shall be due, owing, payable, and belonging to me, by any manner or means whatsoever; especially to receive any payments that are and will be due me by virtue of a contract entered into with the Navy Department to build a light-draft monitor named Etlah, said contract bearing date June 24, 1863, for which I am to receive, upon the full compliance of said contract, the sum of three hundred and eighty-six thousand dollars, in eight equal payments, the Navy Department reserving twenty-five per cent. on such payments until completion and reception of said vessel: giving and granting unto my said attorneys by these presents full power and authority in and about the premises, to have, use, and take all lawful ways and means, in my name, for the purposes aforesaid; and upon the receipt of any such debts, dues, or sums of money, (as the case may be,) acquittances, or other sufficient discharges, for me and in my name to make and give, and generally to do all other acts and things in the law whatsoever needful and necessary te be done in and about

the premises; for me and in my name to do, execute, and perform, as fully and to intents and purposes as I might or could do if per-
43 sonally present; attorneys one or more under him, for the purposes aforesaid, to make, constitute, and again at pleasure to revoke. Hereby ratifying and confirming all and whatsoever my said attorneys shall lawfully do in and about the premises by virtue hereof.

"In witness whereof have hereunto set hand and seal, this second day of January, in the year of our Lord one thousand eight hundred and sixty-four.

"CHARLES W. McCORD. [SEAL.]

"STATE OF MISSOURI,
"*County of S't Louis, ss:*

"Be it remembered that on the second day of January, eighteen hundred and sixty-four, before me, the undersigned, John Jecko, a notary public, duly commissioned and qualified, within and for the county aforesaid, came Charles W. McCord, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and acknowledged the same to be his act and deed for the purposes therein mentioned.

"In witness whereof I have hereunto set my hand and affixed my official the day and year last above written.

"JOHN JECKO,
"*Notary Public.*"

On the 29th of August, 1868, Charles W. McCord and George H. Garrett were decreed and declared bankrupts by the district court of the United States for the eastern district of Missouri. And on the 28th day of September, 1868, Leonard Wilcox was appointed their assignee in bankruptcy. And on the 16th day of October, 1869, the said Leonard Wilcox, as such assignee, and under order of said court, assigned and conveyed to Chouteau, Harrison and Valle, copartners, the title and interest of Charles W. McCord, on the 15th of August, 1868, to a claim described as follows: "A certain claim against the United States Government for extra work performed and materials furnished to said Government by said Charles W. McCord in the building and construction of the iron-clad monitor Etlah, under a contract with said Government."

Subsequently to said proceeding in bankruptcy, Charles W. McCord and James Harrison and Jules Valle died, and Charles P. Chouteau is the surviving partner of the said firm of Chouteau, Harrison & Valle.

The title of said William A. Steel individually to any interest in the claim sued was not shown.

And the court find, as a conclusion of law, that the claim of the petitioners for extras is barred by Charles McCord's receipt in full therefor previous to his assignment in bankruptcy.

By the court.

LORING, J., read the opinion of the court:

The facts found and the petition present two principal claims:

1st. For extra work; that is, for labor and materials furnished for work not required by the original contract, but by the alterations of it made by the United States.

2d. For the increase in the price of labor and materials for work required by the contract, the cost of which was enhanced during the delay consequent on the alterations made.

And the petitioners claim on different grounds. William A. Steel claims on an assignment made to him by Charles W. McCord after the execution and before the performance of the original contract for the construction of the Etlah.

Charles P. Chouteau claims as surviving partner of Chouteau, Harrison & Valle, on an assignment made to that firm, by the assignee in bankruptcy of Charles W. McCord, of all his title and interest,
44 on the 15th August, 1868. The rights of the two petitioners must, therefore, be considered separately.

The assignment made in the proceedings in bankruptcy to A. Chouteau, Harrison & Valle, under which Charles P. Chouteau claims as the surviving partner of that firm, was of the claim first stated, and of that only. The assignment states it in these words: "A certain claim against the United States Government for extra work performed and material furnished to said Government by said Charles W. McCord in the building and construction of the iron-clad monitor Etlah, under a contract with said Government." Thus the claim assigned by the proceedings in bankruptcy was the claim for extras only; and that the parties understood this at the time is proved by the fact that, in the original petition filed by George W. McCord on the 25th October, 1869, for the use of Chouteau, Harrison & Valle, no other claim was made than that for extras.

Then the assignment in bankruptcy expressly conveyed the title and interest which Charles W. McCord had in such claim for extras on the 15th of August, 1868. And the fact is found that Charles W. McCord was paid for these extras, in all, $210,991, and that of this sum the last payment, of $31,111, was made on the 11th of May, 1866, and that then Charles W. McCord receipted for the extras expressly in full.

And there is nothing in the evidence to suggest that Charles W. McCord then claimed more, or gave the receipt in full under duress or pressure of any kind, or in any ignorance or mistake of the facts, and the words of the receipt informed him fully of its nature. Such a receipt, so given, thereupon discharged the debt it specified, for it declared that intention of the parties. And as the claim for extras was thus discharged before the assignment in bankruptcy, Chouteau, Harrison & Valle took nothing thereby, and Chouteau, as surviving partner of that firm, is entitled to nothing here.

All that remains to be considered are the claims of William A. Steel, and he claims an interest of one-third in all the claims sued, under an assignment made to him by Charles W. McCord, after the execution and before the performance of the contract for the construction of the Etlah.

But Steel's claim as to the extras is barred by the final settlement for them made between Charles W. McCord and the United States on the 11th May, 1866, by the payment of $31,111, and the receipt in full stated above, because that settlement was made without notice or knowledge on the part of the United States of the assignment claimed by Steel.

And this disposes of the claim for extras altogether.

As to the other items of claim, Steel's title is rested on the averment made in the original petition by Charles McCord. After stating the contract for the construction of the Etlah, the petition proceeds as follows: "Petitioner further states that, after such contract was executed, he made a subcontract for the construction of said steam-battery with the firm of McCord & Co. and William A. Steel, in which subcontract the said McCord & Co. had an interest of two-thirds, and the said Steel an interest of one-third, in the original contract." This is an averment

that Charles McCord, by the subcontract mentioned, assigned his contract for the construction of the Etlah to McCord & Co. and William A. Steel, in the proportions of two-thirds to the former and of one-third to the latter, and Steel's title is more distinctly stated in the amendment to the original petition filed by the present petitioners since the hearing of the case. In that amendment the words of the present
45 petitioner are as follows: "They state and aver the fact to be, as was alleged in the original petition of said Charles W. McCord, filed in this case in his life-time, that the said William A. Steel, during the performance of said contract to build said steam-battery, and before the bankruptcy of said Charles W. McCord, became an equitable owner of the one-third interest in said contract with said Charles W. McCord, and was, and still is, and ever has been, the equitable owner of the one-third part of the said claim against the United States herein set out." This extract distinguishes between the contract with Charles W. McCord "to build said steam-battery" and the claim against the United States for money due for the performance of that contract; and it founds Steel's claim to a proportion of the money due on the assignment to him of one-third of the contract. And in the same amendment the petitioners state distinctly Steel's ownership in the contract for the construction of the Etlah, as follows: "That by the terms of said contract said steam-battery was to be completed on or before the 24th day of February, 1864; that after the execution thereof your petitioner, William Steel, became the owner of one-third interest in said contract."

Upon averments like these, which are the petitioner's own statement of his title, it must necessarily be held that the assignment alleged was of the contract for the construction of the Etlah, as distinguished from an assignment of the claim for the money due on the performance of the contract.

If this alleged assignment of the original contract for the construction of the Etlah were proved, then, under the statute of 17th July, 1862, (12 Stat. at L., 596,) which prohibits the assignment of contracts made with the United States, the assignment would be utterly void, and convey no title or interest to the assignee; and, moreover, by the other provisions of the statute, the contract assigned would be annulled as against the United States, so that it could not be a ground of action here for any one.

In the jurisdiction of this court there is a wide difference between the assignment of a contract made with the United States and an assignment of the claim for the money due from them for the performance of the contract. For the former, being prohibited by statute, is illegal, and the assignment is a mere nullity, and passes no title, either legal or equitable, to the assignee, while the assignment of a claim for money due from the United States is lawful, and provided for by the statutes constructing this court; and, therefore, here the title of an assignee of a claim for money due from the United States is not merely equitable, but, by force of those statutes, is strictly a legal title, and as much so as the title of the vendee of a chattel; for the statutes make such claim for money due as transferable as a chattel, and, therefore, the assignee of such a claim may sue it here in his own name.

But in this case, whether the assignment was of the contract itself or of the claim for the money due for the performance of the contract, it is denied by the defendants, and put in issue by the general traverse "of each and every allegation" of the petitioners, and it is not proved. The averment is that the assignment was made in a subcontract for the construction of the Etlah. And where a contract is alleged it must be proved,

because its effect is a matter for legal construction, and not for averment by parties. And in this case the subcontract, if proved, might show that the assignment was of the claim for the money sued for, which the parties must have intended, and that the averment in the petition that the assignment was of the contract itself was a mere mistake in
46 statement by the clients in the case. But the subcontract by which it is averred the assignment was made, if in writing, is not produced, and whether it was in writing or by parol, not a witness testifies to it, and there is nothing in the evidence from which such assignment or any contract with Steel individually can be inferred.

All that is shown by the evidence is that the hull of the Etlah was built at the ship-yard of the firm of McCord, Steel & Bastor, and that sometimes the clerk and sometimes Mr. Steel paid the workmen employed there; that iron-work was done at McCord and Company's foundery and machine-shop, and other work elsewhere; that Chouteau, Harrison & Valle furnished to McCord & Company iron for the Etlah, and that Charles W. McCord, and sometimes Mr. Steel, ordered iron; that iron was at first charged to the firm of McCord, Sanger & Steel, and then to McCord & Company, who paid Chouteau, Harrison & Valle $109,000 to $110,000 for iron, excepting $12,725.48, for which McCord & Company gave their notes.

These dealings with the various firms mentioned may show that they were resorted to in the construction of the Etlah, as were other persons at other places. Or this evidence may tend to show subcontracts with those firms for the construction of the Etlah, but it does not show or tend to show any assignment to or contract with William A. Steel individually, or that he individually furnished or paid for labor or materials for the Etlah, or has any ground of claim against the United States.

The other items of claim, viz, for gun-carriages, insurance, protection of the Etlah against ice-gorge, &c., were not proved at all.

As to the claim for gun-carriages, $7,500, the contract provided for two gun-carriages, which were not furnished; but two others were substituted for them, which cost $7,500; and as extras Charles W. McCord could only claim that amount, less the cost of the gun-carriages contracted for and not furnished. He received the full contract-price, and over and above that for two gun-carriages, $3,400, and he receipted for this as the amount due, "less the gun-carriages contracted for," and there was nothing to show that what he received for gun-carriages in the contract-price and the $3,400, taken together, left anything due.

As to the claim for extra insurance, $2,400; for protection of the ship against ice-gorge, &c., $2,812.88:

These related to the detention of the vessel at Saint Louis after her completion. The fact of the detention was shown, but its duration was not shown, and no evidence whatever was given of the expenditures made or incurred. The court, therefore, had no means of making any allowance for these items, and it was not to supply evidence which is or ought to be in the possession of the claimants.

But we think that in this case, apart from the considerations previously stated, no ground of action against the United States is shown, for they are not shown to have been in default.

The contract for the construction of the Etlah provided that alterations might be made from the original specifications, and that if they caused extra expense, that should be paid for; and if they effected a reduction of the cost, that should be subtracted from the contract-price.

This privilege of the United States to make alterations on the terms stated being expressly provided for in the contract, the contract-price

related to that privilege as much as to any other provision in the contract, and therefore it must be taken as included in that price, and paid for in it. And the United States cannot be held liable in damages for exercising a privilege they had purchased, but only for abusing it; and the fact is found that they did not abuse it, but made the
47 alterations shown without unreasonable delay. And this has reference, as the parties must have had, to the nature of the undertaking.

When the contract for the construction of the Etlah was made the specifications were, doubtless, as perfect as the knowledge of the subject then permitted, and it was then uncertain whether any alterations would be made, and therefore the time fixed by the contract for its performance was the time required for the construction of such a vessel as was then designed; and the evidence is, that the time fixed was sufficient for that purpose. But an iron-clad steam-battery was then a novelty in naval construction, for the battle of the monitors in Hampton Roads in the previous summer had made, as has been truly said, as sudden and complete a revolution in naval warfare as was made by the introduction of gunpowder; and this revolution required changes in almost every particular of that multifarious combination without parallel, which now makes a ship of war and fits her to struggle with the elements, and with adversaries; and the effect of any change could be but imperfectly ascertained beforehand by science and forethought, and the evidence shows that changes from plans elaborated by naval engineers and constructors were continually demanded by the experiences of iron-clads under fire in the service; and this accounts for the changes shown, that, according to the testimony, resulted in a different vessel from that originally designed.

And it was these changes which produced the extras which make the first claim considered, and for which Charles W. McCord in his life-time receipted in full, and for which he received altogether $210,991 over and above the contract-price of $386,000, which was also paid him in full.

And as to the second claim, of an addition to the contract-price, it is for labor and materials required by the contract, and furnished under it; and it is rested solely on the ground that the prices of these rose during the delays experienced from the changes in the currency, and political events, which increased the prices of everything. But the United States as a contractor, not being in default for the delays, is no more liable for such increase of prices than any individual contractor would be.

On the whole case the judgment of the court is that the petition be dismissed.

Nott, J., did not sit in this case, and took no part in the decision.

48 In the Court of Claims.

CHARLES P. CHOUTEAU, SURVIVING PARTNER of the firm of Chouteau, Harrison and Valle, and WILLIAM A. Steel,
vs.
THE UNITED STATES. } No. 6084.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause and the final judgment of the court thereon, of

the application of the counsel for claimants for the allowance of an appeal, as filed in the clerk's office, March 3, 1874, and of the order of the court of March 3, 1874, allowing the same, of the findings of fact by the court and the conclusion of law thereon on which the court founded its judgment, of the opinion of the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this sixteenth day of March, A. D. 1875.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 56. Charles P. Chouteau, su'v'g partner of the firm of Chouteau, Harrison & Valle, and William A. Steel, appellant, vs. The United States. Court of Claims. Filed 16th March, 1875.

In The United States Supreme Court.

CHARLES P. CHOUTEAU, Successor of CHOUTEAU, HARRISON, VALLE & WILLIAM B. STEEL,
vs.
THE UNITED STATES.

APPEAL FROM COURT OF CLAIMS.

APPELLANT'S BRIEF.

STATEMENT OF CASE.

On the 24th of June, 1863, Charles W. McCord entered into a contract with defendant for the construction of an iron clad steam battery, of the dimensions and in accordance with certain plans and specifications furnished with and forming a part of the contract, which battery was to be completed within eight months from the date of the contract, "unless arrested by any contingency which human foresight could not avert," (p. 1 of Record,) and as a penalty for any delay in the completion thereof, he was to be subject to a deduction, from the contract price, of $4,500 per month, for the period delayed; and on the other hand, was to be allowed an addition, at the price of $4,500 per month, if completed prior to same time.

It was further provided that the United States should

"have the privilege of making alterations and additions to the plans and specifications at any time during the progress of the work as they may deem necessary and proper; and if said alterations and additions shall cause extra expense to the parties of the first part they will pay for the same at fair and reasonable rates; and should such changes cause less work and expense to the parties of the first part a corresponding reduction to be made from the contract price, and in each case the cost of the alterations to be determined when the changes are directed to be made." (P. 3, Sec. 16.)

The Court of Claims also find that the vessel specified in the contract was completed in November, 1865, and accepted, and the original contaact price paid.

"The completion of the vessel within the time specified in said contract was prevented by the changes and alterations from his original plan and its specifications made by the United States, and was thus delayed till November, 1865.

"These changes and alterations extended from July, 1863, to near the time of the completion of the vessel, and from the 15th of June, 1864, to September 19, 1864, the work upon the vessel was substantially suspended for the purpose of increasing her depth and making the other changes incident to that.

"These changes and alterations increased the size, weight and draught of the vessel, and the amount of materials and labor required for her construction; and during the various delays above stated the prices of labor and materials increased, and skilled labor became difficult to be procured at St. Louis, because men were drafted into military service or left the locality to avoid being drafted.

"From these circumstances the work required and done under the original contract was enhanced in cost to the contractor $122,166 beyond the contract price, his labor and materials saved by changes and alterations $3,882.80, leaving a balance for increased cost of work required by the contract of $118,283.20.

"And from the same circumstances the cost to the con-

tractors of the extra materials and labor on the vessel required by the changes and alterations made, exclusive of special contracts paid, were $172,273.55, of which $116,111 were paid, leaving a balance for extra material and labor of $56,162.55." (P. 22.)

On the 24th of November, 1863, McCord executed a power of attorney to Gilman Sons & Co., (a firm of bankers in New York,) "to collect from the Navy Agent, or authorized officers of the United States Government, all payments due or to become due to me for building an iron-clad vessel at St. Louis, Missouri, named the Etlah, as per contract dated June 24, 1863." (Page 25 of Record.)

This power of attorney not being satisfactory, perhaps for the reason that there was no specific authority therein to sign receipts for moneys paid thereunder, was superseded by another power of attorney, executed on the 2d day of January, 1864, by McCord to the same parties, which authorized Gilman Sons & Co., "to ask, demand, sue for, recover, and receive all such sum or sums of money, debts, goods, wares, and other demands whatsoever, which are or shall be due, owing, payable, and belonging to me by any manner or means whatsoever; *especially* to receive any payments that are or will be due me by virtue of a contract entered into with the Navy Department, to build a light-draft monitor, named Etlah, said contract bearing date June 24, 1863, for which I am to receive, upon the full compliance of said contract, the sum of $386,000, in eight equal payments, the Navy Department reserving twenty-five per cent. on such payments until completion and reception of said vessel, * * and upon the receipt of any such debts, dues, or sums of money, (as the case may be,) acquittances or other sufficient discharges, for me and in my name to make and give." (Page 25 of Record.)

On the 24th of April, 1866, the officers of the Navy Department made out a voucher, certified by the General Inspector of Steam-Machinery, Rear-Admiral Superintending, and Chief of Bureau, in the following form:

"U. S. NAVY DEPARTMENT

To CHARLES W. MCCORD, *Dr.*

"*Appropriation Construction and Repairs.*

"For work done to the light draft monitor 'Etlah,' which is extra to the contract, dated June 2, 1863, being the full and final payment on all extras and in full for all claims and demands for that work, - - $31,114 00

Less amount paid E. W. Barstow & Son, as per order, - -	$605 65	
Outfits and equipments called for by the contract but not furnished,	3,852 18	4,457 83
		$26,653 17

"I certify that the materials and labor which are extra to the contract dated June 24, 1863, put upon the vessel Etlah,. built by Charles W. McCord, amount in value to $116,111.00, (certificates having been previously given for $85,000,) and they are according to directions which have been given from time to time.

"ROBERT DANBY,

"*General Inspector Steam Machinery for the Navy.*"

To this was appended a receipt, as follows:

PAYMASTER'S OFFICE, U. S. NAVY,
20 *Broadway*, *New York*, *May* 20, 1866.

Received of J. E. Eldridge twenty-six thousand six hundred and fifty-three dollars and seventeen cents in full of the within bill, and have signed duplicate receipts, $26,653.17.

CHARLES W. MCCORD,
Per Gilman Sons & Co., Attorneys.

On the 29th of August, 1868, McCord was declared bankrupt, and on the 28th of September, 1868, Leonard Wilcox was appointed assignee, who, on the 16th of October, 1869, sold and conveyed to Chouteau, Harrison & Valle the claim of said bankrupt against the United States, amounting nominally to $139,000, for extra work performed and

materials furnished to said Government, in the building and construction of the said monitor. (See p. 11, of Record.) Subsequently thereto James Harrison and Jules Valle became deceased, leaving Charles P. Chouteau sole surviving partner of said firm. (P. 26.)

Upon these facts the Court of Claims found the single conclusion of law, "That the claim of petitioners for extra is barred by Charles McCord's receipt in full therefor, previous to his assignment in bankruptcy." (P. 26.)

In this conclusion of law it is insisted that the Court erred, and we respectfully submit the following causes of error: First. Charles W. McCord did not execute a receipt in full for the extras claimed.

a. The so-called receipt purports to have been executed by Gilman Sons & Co., as attorneys in fact of McCord, under a power of attorney giving special power to collect the moneys payable under the contract specifying the amount and manner of payment. There was no authority even to collect any moneys over and above the amount of that specified in the original contract, amounting to $386,000, much less to bind the principal in a less amount than was actually due on a claim outside of said original contract. When certain special objects are enumerated in a power of attorney the general words and power will be restrained to the objects specified.

Byles on Bills, 32.
Rosseter vs. Rosseter, 8 Wend., 494.
Wallace vs. Branch Bank at Mobile, 1 Ala., 565.
Kingsley vs. Bank of State, 3 Yerger, 107.
Story on Agency, 98, 99.

b. At the time this receipt for $26,653.17 was given by such attorneys, there was due upon the items of extra work a balance of $87,273.88, and there was no authority in such attorneys to discharge such sum by the payment of a smaller sum. Authority to collect a claim, even if the attorneys named had such authority, carries with it no authority to discharge the debt by payment of a less sum. This law is too well settled to require discussion or citation of cases.

c. Receipts are only *prima facie* evidence of the facts recited, and must be construed in accordance with all facts and circumstances surrounding the transaction, and when, as in this case, the fact is found that the payment was not in full; that such receipt was not given by the party in person, but by parties representing him, without any express authority to bind the principal, and without the knowledge of the principal, such act cannot be reasonably construed into a waiver or release of so large a sum of money without any consideration.

2. The receipt purported to be in payment for extra work on the Etlah, as audited by the Construction Bureau of the Navy Department, and it had no reference to that portion of McCord's claim which consisted of the increased cost in the construction of said monitor, so far as related to the work done under the original contract, caused by the acts of the Government in the prolongation of the time in doing the work. That portion of such claim was not considered by such officers, and could not have been considered without special instructions from the Secretary, and there is not the slightest ground for the conclusion at law, that such attorneys did or could, under the authority shown, release a claim for $120,000, which at that time had not even been presented for consideration.

It is true that in the opinion of the Court of Claims as delivered arguments are used in connection with the claim for increased cost occasioned by the delays in constructing the Etlah, which are not contained in the record as conclusions of law, and consequently not subject to review by this Court; yet, as the same arguments may be urged by the appellee, we may be pardoned in presenting our views in opposition to the views expressed by the Court in its opinion, which were—first, that the assignment of the assignee in bankruptcy of C. W. McCord to Chouteau, Harrison & Valle, only conveyed so much of the claim as related to the items for extra work and materials, and not to the

entire claim; secondly, that this claim "rested solely on the ground that the prices of these (labor and materials) rose during the delays experienced from the changes in the currency and political events, which increased the prices of everything. But, the United States as a contractor, not being in default for the delays, is no more liable for such increase of prices than any individual contractor would be."

The answers to these propositions are 1st. McCord purported to have a claim against the United States growing out of the contract for the construction of the Etlah, amounting, so far as the assignee in bankruptcy was advised, to $139,000, which, after deducting Steel's supposed indebtedness, was believed to be approximately correct.

This claim was sold to Chouteau, Harrison & Valle by the assignee in bankruptcy in general terms, as "all the title and interest vested in him as aforesaid in and to said claim, be it legal or equitable," &c. The description as given is "a certain claim against the United States Government for extra work performed and materials furnished to said Government by said Charles W. McCord, in the building and construction of the iron-clad monitor Etlah, under a contract with said Government." This description may lack in completeness; but it is sufficient to designate the thing sold, as being a claim against the United States, growing out of the contract for the construction of the iron-clad monitor Etlah. The entire claim, whatever it was, was sold, and the only interest the defendant can have in the question of title is to provide against the payment of this claim to other parties, for the defendant owes the money to some party. There being sufficient to indicate the claim so assigned, and especially as there is no evidence of the existence of more than one claim against the United States in favor of said bankrupt, the title passes under the sale. Even in the case of deeds of real estate it is held that "if the thing intended to be granted appears clearly and satisfactorily from any part of the description, and other matters of description are mentioned which are not applicable to the thing, the

grant will not be defeated, but those circumstances will be rejected as false or mistakes." Johnson vs. Simpson, 36 N. H., 91. Also,

See Worthington vs. Hillyer, 4 Mass., 196.
Bac. Abr., Grant, J.
2 Roll. Abr., 65.
Coke Lit., 146.

2d. The law is laid down by this court in the case of McDermot vs. Jones, 2 Wall., p. 1, as follows: "If, by the fault of the defendant, the cost of the work and material has been increased in so far the jury will be warranted in departing from the contract prices."

In the case of Dubois vs. Delaware and Hudson Canal Company, 4 Wendell, 291, when the plaintiff had contracted to perform certain work within a certain time, but was delayed by the defendant so that the performance of the work was carried into the winter, the Court held that if the work was made more expensive to the plaintiff by reason that he was obliged to perform it late in the season, the additional expense thus incurred ought to be added to the contract price. Also,

Robson vs. Godfrey, 1 Hall, N. P., 236.
Lee et al. vs. Partridge, 2 Duer, 463, 468.
Merrill vs. Ithaca & Owego R. R. Co., 16 Wend., 556.

The Court find that the completion of the vessel, which, according to the contract, was to have been completed in March, 1864, "was prevented by changes and alterations from the original plan and its specification, by the United States, and was thus delayed until November, 1865," that "during the various delays, above stated, the prices of labor and materials increased, &c., and that, from these circumstances, the work required and done under the original contract, was enhanced in cash to the contractor $122,166."

These facts, bring the case clearly within the principle of the decisions above cited, and the defendant, upon such a statement, would be liable to plaintiff for such enhanced cost.

But it is urged that the defendant reserved the privilege in the written contract of making alterations and additions to the plans and specifications at any time during the progress of the work. That these alterations and changes "were incident to the novelty of the undertaking, and were from time to time suggested by the experience of iron-clads under fire in the naval service, and were made by the United States without unnecessary delay."

The reply to this is, that in the construction of the contract all of its provisions should be taken together, and the time of its fulfillment was as much an element as any other provision in it. The time was fixed, and a penalty of $4,500 was provided in it against the contractor for each month's default on his part in completing it within the time specified, to be deducted from the contract price. The contractor had an absolute right to complete the vessel "in eight months" from the date of the contract. The price for which he was to build it was based upon the rates then prevailing, and the United States were bound to do no act that would prevent such a result. If it should determine to avail itself of the privilege of making alterations and additions to the plans and specifications, it necessarily results that it was bound so to use that privilege as not to prevent the contractor from completing his contract within the specified time.

It would be an unreasonable construction of the contract to hold that under the clause giving the privilege of making alterations and additions, the United States should have the right to delay the contractor in his work, at his expense and to his detriment, to await the results of other "iron-clads under fire in the naval service," in order to avail itself of such experience. There is nothing in the contract by which such a latitude in privilege can be based or even contemplated.

Again, the clause in the contract giving the privilege to the United States to make alterations and additions, provides that "in each case the cost of the alterations to be de-

termined when the charges are directed to be made." Thus the contractor had a right to be consulted whenever such alterations or additions were ordered, at least so far as the price was concerned, and, as a consequence, if the price could not be agreed upon he was not bound to make such alterations. Therefore the privilege was subject to terms, and not an unqualified right which the United States "had purchased." The terms not having been complied with; the cost not having been agreed upon, and the alterations and additions having been made upon the demand of the United States notwithstanding, amounts to a waiver of that provision of the contract, and the United States can claim no benefit from it.

A. L. MERRIMAN,
Attorney for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

CHS. P. CHOTEAU, SURVIVOR, APPLT., *vs.* THE UNITED STATES. } No 56.

STATEMENT OF CASE.

Appellee's Brief

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

CHS. P. CHOTEAU, SURVIVOR, APPLT.,
vs.
THE UNITED STATES. } No. 56.

STATEMENT OF CASE.

July 9, 1863, Charles W. McCord made a contract with the United States for the construction of the iron-clad steam-battery Etlah, at Saint Louis, for $386,000, to be completed and delivered at Cairo, Ill., within eight months from that date. The Government, by the sixteenth article of the contract, reserved the right to make "alterations and additions to the plans and specifications at any time during the progress of the work," paying the enhanced cost where the alterations increased the expense, and being entitled to a corresponding deduction if the changes diminished the amount of labor and expense below that mentioned in the original specifications.

The vessel was not completed until November, 1865. The United States accepted and paid for her the full contract-price. Her earlier completion was prevented by changes and alterations made by the United States, increasing her size, weight, and draught, and the amount

of labor and materials required for her construction. During the delay thus caused the prices of labor and of materials increased, thereby enhancing the cost of the work required by the original contract (above deductions) to the contractor above contract-price, $118,283.20. The cost of the extra materials and labor was $172,273.55, of which $116,111 were paid. After the delivery of the vessel, to wit, April 26, 1866, McCord presented his claim for payment "for work which is extra to the contract," showing a credit of a payment by his order of $605 and of a deduction for diminished cost below contract-price of certain work, and indicating as due a balance of $26,653.17, which was that day paid him and receipted for as "a full and final payment" and "in full for all claims and demands" for work on that vessel.

December 17, 1866, McCord was paid in full, $3,400, for increased cost of certain gun carriages put on board of the Etlah.

August 29, 1868, McCord was decreed a bankrupt. His assignees sold to Choteau and others "a certain claim against the United States Government for extra work performed and materials furnished," &c.

The Court of Claims found, as conclusion of law, that the petitioner's claim was barred by McCord's receipt given before the assignment in bankruptcy.

BRIEF OF LAW.

The correctness of the legal conclusion arrived at by the Court of Claims is so obvious as hardly to require discussion or citation in its support.

The amended petition presents Charles P. Choteau, surviving partner, as the claimant. (Record, 21, middle.) The original petition was by Charles McCord, the con-

tractor, for the use of the firm which Choteau represents, and Fusz, McCord's administrator, subsequently appeared to prosecute it for the same use. (*Ib.*) We disregard the name of William A. Steel, because the court found as a fact that he had shown no title. (Record, 26, last two lines of findings of fact.)

Neither of the persons mentioned has any claim whatever. It originated in, and was based upon, contract. Subsequently to its accruing, McCord went into bankruptcy. (Record, 26, middle.) Thereupon all claim that he had (if any) passed to his assignee, leaving nothing for him or his administrator to prosecute; nor could the assignee's vendee demand anything more than the precise claim which he purchased. (Act of March 2, 1867, c. 176, § 14, in 14 Stats., 522.) This was, "A certain claim against the United States Government for extra work performed and materials furnished to said Government by said Charles W. McCord in the building and construction of the iron clad monitor Etlah under a contract with said Government." (Record, 26, near middle.)

I.

The contract-price of the Etlah was $386,000. (Record, 18, sec. 8.) This has been fully paid. (Record, 22, folio 39, top.)

Work and labor extra the contract, amounting in value, as found by the court, to $172,273.55 (and as determined by the naval officers to $116,111) was done. (Record, 22, middle.) By sec. 16 (Record, 3) of the original contract, it was contemplated that changes and additions might be required; and that if the cost of construction was thereby increased, "fair and reasonable" compensation

was to be made; if it was diminished, there was to be a *pro rata* reduction. (*Ib.*) But, in either event, "the cost of the alterations to be determined when the changes are directed to be made." It was evident that the cost might be a disputed point, and it was to be arranged between the parties. They did adjust it at $116,111 increase, less $3,852.18 diminution of cost. In this adjustment McCord acquiesced and receipted in full for the agreed amount. (Record, 23, 24.) This settlement was final and left no claim to be transferred by him to his assignee, administrator, or anybody else. (Smith's Lead. Cas., *444; Palmerton *v.* Huxford, 4 Denio, 166; Pierce *v.* Pierce, 25 Barb., 243; Taylor *v.* Nussbaum, 2 Duer, 302; Emrie *v.* Gilbert, Wright, 764; Cool *v.* Stone, 4 Iowa, 219; Mathis *v.* Bryson. 4 Jones's Law, 508; McGlynn *v.* Billings, 16 Vt., 329; McDaniels *v.* Lapham, 21 Vt., 222; Cole *v.* Champlain Transp. Co., 26 Vt., 87; Barry *v.* Goodrich, 98 Mass., 339.)

U.S. v. Child 12 Wall, 232; U.S. v. Justice, 14 Wall, 535; U.S. v. Carlin 94 U.S. 404 Cotton

A party, knowing all the facts, cannot agree "to receive a less sum in full discharge in order to get that much in possession and then litigate as to the remainder which he claims." (Pepper *v.* Aiken, 2 Bush, 253.) Even where the settlement is procured through fraud or mistake, the party claiming to review it must first refund the money he has obtained under it before it can be re-opened. (Potter *v.* Monmouth Fire-Ins. Co., 63 Maine, 443.)

II.

Not only was there no transfer by McCord's assignee in bankruptcy of any claim for the enhanced cost of labor and material put into the work done in fulfillment of the contract, but McCord never had, nor, so far as ap-

pears, ever professed to have, any such claim. He agreed to do that work for the gross sum which has been fully paid him, and took all the chances of a rise or fall of labor and material in the time of construction. The right to make changes was stipulated for, and these were made "without unnecessary delay." (Record, 22, on lower half of page.)

Even if it were true, as stated (without proof) by claimant's counsel, that the delay bankrupted McCord, that would be no reason why, after obtaining his discharge from the claims of those who furnished the material, he should be compensated for the delay. It is not a technicality, but a suggestion of the highest equity, that if there were any such claim, it passed to and remains in the assignee in bankruptcy, for the benefit of McCord's creditors. But no such claim exists.

III.

From the opinion of the court below, it would appear that it was claimed that Steel's interest, to the extent of one-third, was proved by the bare allegation of it; but this confounding of allegation with proof calls for no labored refutation or examination.

EDWIN B. SMITH,
Assistant Attorney-General.

17 mar 69

United States Supreme
No 3 orig

In the Matter of the Petition,

95 US 68

OF

JAMES T. EASTON AND JAMES McMAHON,

FOR A WRIT OF PROHIBITION TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK, SITTING AS A COURT OF ADMIRALTY IN A CAUSE OF WHARFAGE.

Post Waterborne

Argument Against Jurisdiction.

EDWARD D. McCARTHY,
Petitioner's Proctor,
Tribune Building, New York.

Oct 2 1876

Oct 26 1877
Dismissed

NEW YORK
National Printing Company, 13 Chambers Street.
1877.

The National Printing Company, Law Printers, 13 Chambers St. New York.

United States Supreme Court.

In the matter of the petition of JAMES T. EASTON and JAMES MCMAHON, for a writ of prohibition to the District Court of the United States, held in and for the Eastern District of New York, as a court of admiralty, in a cause of wharfage and dockage.

A petition was filed in this court on Monday, the 19th day of December, 1876, asking for leave to move this court for a writ of prohibition to the District Court of the Eastern District of New York.

Upon said petition, this court made and caused to be entered an order permitting argument to be had upon the merits of said petition.

Pursuant to said order, notice was given to the libellants in the said cause of wharfage, and to the clerk of the court, that argument would be had on the 19th day of February, 1877.

A copy of the petition was served upon libellants, and upon the clerk of the court.

The prominent facts of said petition are these: The canal boat or barge "John M. Welch," which is the *res* proceeded against in the Admiralty Court, is owned by your petitioners, who are citizens of the State of New York; she is without sails or engine or any means of locomotion.

In the month of Octoter, 1876, she lay at a wharf at the foot of Banks Street, New York City, for about ten days. She was charged wharfage at the rate of three dollars and a half ($3.50) per day, which is at least three dollars ($3.00) per day more than the rate of wharfage charged to the owners of the same kind of boats, plying upon the Hudson River and the Erie Canal. This rate of wharfage was fixed by a law of the State of New York, of date May the 6th, 1870. This law is set out in the petition.

The District Court of the United States for the Eastern District of New York, enforces wharfage claims, by proceeding *in rem*. Reported cases of such adjudication are the "Kate Tremain," 5th Benedict's Reports, and the "Ann Ryan," 7th Benedict's Reports.

The reasons which have led the petitioners to ask for a writ of prohibition are set forth in the petition.

It is believed that no other remedy than the writ of prohibition would be effectual. In no other way can the questions involved be brought before this Court. Decisions of the District and Circuit Courts, upon this question are not harmonious. The constitutionality of the wharfage law of the State of New York, has never been discussed heretofore.

The following propositions are now submitted against the jurisdiction of the Court below.

A Court of Admiralty has no jurisdiction over a cause of wharfage, because:

First. The contract of wharfage is not a maritime contract.

Second. The maritime law gives no lien for wharfage.

Third. In a cause of wharfage, a Court of Admiralty cannot proceed *in rem* to enforce a lien given

by the municipal law. If Admiralty Courts can enforce local liens at all, they are such liens only as arise out of contracts of material men. Moreover the law of the State of New York gives the wharfinger no lien.

Fourth. The wharfage law of the State of New York is repugnant to the Federal constitution, and is void.

FIRST.

The District Court has no jurisdiction over the barge "John M. Welch," because the contract of wharfage is not a maritime contract.

(1.) The scope of territorial jurisdiction of Federal Courts of Admiralty, can no longer be questioned. It extends over the seas and over all navigable waters, whether tide or tideless, land-locked or open.

The Genesee Chief, 12 How.
The Lottawana, 21 Wall.

And the subject matter of admiralty jurisdiction, never much disputed in this country, is almost as well defined. This embraces maritime torts—to be determined by locality solely—and maritime contracts.

Contracts are held, in this country, to be maritime, if they concern maritime adventures, and are to be performed wholly or partly on public navigable waters.

The Belfast, 7 Wallace.

Enumeration of the classes of contracts heretofore held to be maritime would be easy. Prominent

amongst them are affreightment: pilotage: wages both of seamen and of master; salvage: bottomry and respondentia bonds: repairs and supplies to vessels, at least to foreign vessels: carriage of passengers: marine insurance: possessory rights to vessels, &c. &c.

Insurance Company *vs.* Dunham, 11 Wall.
De Lovio *vs.* Boit, 2 Gallison.

But all contracts heretofore denominated maritime are such as are to be performed wholly or in part on navigable waters, or such as concern the refitment and reparation of vessels. Hence the contract of ship building has been held not to be maritime.

People's Ferry Company *vs.* Beers, 20 How., 393.

The contract of the stevedore has been held not to be maritime.

The Circassian, 1 Benedict, 209.
Graham *vs.* Haskins, Olc. 227.

Services rendered by a watchman on board a vessel lying in port, declared not to be maritime.

The ship Harriet Olc. 229.

The most eager advocate of an enlarged admiralty jurisdiction, has never claimed that warehousing of goods was a maritime service.

In "Insurance Company *vs.* Dunham," 11th Wall, p. 1, this court held that the contract of marine insurance was maritime, because: 1st: It was a contract against marine casualties and analogous to contracts of affreightment, and 2d: Because it sprang from the law maritime and derived its rules and incidents therefrom.

But it has been held that injury done to a wharf by a floating vessel was not a maritime tort.

"The Ottawa," 5th Am. Law T, 147.

Except decisions made by the District Courts of the Eastern District of New York, followed by the Circuit Judge for that District in a decision not yet reported, there are no decisions either of American or of English Admiralty Courts, which hold that a contract of wharving is maritime.

Decisions which seem to establish the contrary proposition are numerous.

"So far from this contract being purely maritime and touching rights and duties appertaining to navigation, *it was a contract made on land to be performed on land.*"

People's Ferry Co. *vs.* Beers, 20 How., 402.

"Thus far no case of the kind (*i. e.*, enforcing a maritime lien in behalf of a shipwright) has been sanctioned by this court."

Ibid.

"It will be found that the inquiry has been into the nature and subject matter of the contract: Whether it was a maritime contract and the service a maritime service, *to be performed upon the sea* or *upon waters within* the ebb and flow of the tide."

6 How., 344.

"The Admiralty Court is a maritime court, instituted for the purpose of administering the law of the seas. There seems to be ground therefore for restraining its jurisdiction in some measure, within the limit of the grant of the commercial power which

would confine it, in cases of contract, to those concerning the navigation and trade of the country upon the high seas, &c."

Allen *vs.* Newberry, 21 How., 246.

"Because the contract was made upon the land and related to service to be performed upon the land, therefore it was not within admiralty jurisdiction."

Ransom *vs.* Mayo, 3 Blatch., 71.

"Such contracts (*i. e.*, those of shipwrights) are regarded as contracts *made on the land* and *to be performed on the land*, as much as contracts for steam engines, anchors or chronometers."

Cunningham *vs.* Hall, 1 Cliff., 51.

"It appears that the sloop "Two Friends" was not on a voyage; that she was lying here in port under the care and direction of her owner. The contract was made on the land, *infra corpus comitatus*, and is not within the jurisdiction of this court."

Bee's Ad. Rep., 440.

"Their contract (the shipwright's) is made with persons whom they know or ought to know; their services are all executed within the body of a *county*, and mostly on dry land above high water mark; their *wages have no reference to a voyage performed or to be performed*; the shipwrights have no concern whatever in the vessel after she is afloat."

Brig Hannah, Bee's Ad. R., 421.

"This being a transaction on land, the vessel not being on a voyage, but unloaded and the cargo sold

* * * * * Jurisdiction is not in the court of Admiralty."

The Lady Horatia, Bee's Ad. R., 169.

The cases cited from Bee's reports have been quoted with approbation by this Court, in the 20th How., p. 402.

"Work done upon a vessel in the dry dock, preparatory to coppering her, is not of a maritime character."

Abb. Ad. R., p. 569.

"The subject matter of the contract—the substantial object and end—must pertain to navigation or be connected with transactions performed by vessels on the sea to become maritime in its nature and be clothed with the privilege of a remedy in the Admiralty Courts: and it appears to me that an agreement acquires this maritime quality only when the matters performed or entered upon under it pertain to the fitment of a vessel for navigation, aid and relief supplied her in preparing for and conducting a voyage, or the freighting or employment of her as the instrument of a voyage. Collateral contracts * * * * incidentally benefiting a voyage, acquire no special property thereby which renders them maritime."

Cox *vs.* Murray., Abb. Ad. R., 343.
See also Garvey *vs.* Crocket, Abb. Ad. R., 490.
The Amstel., 1 Blatch and H., 215.

"Manifestly not every contract in relation to maritime matters falls within the cognizance of maritime Courts. * * * * * These services (ship keeper's) are distinct from the navigation of the vessel, ceasing when that commences; and have the same character

on board a hulk, under keeping to be broken up or destroyed, as upon a vessel preparing or intended for sea."

Abb. Ad. R., pp. 492-3.
McDermott *vs.* The S.S. Owens, 1 Wall. J., 370.
The Grand Turk., 2nd Pitts. (Pa) R., 326.
Philips *vs.* Scattergood, Gilpin's Ad. R., p. 3.

(II.) The contract of the wharfinger is made on the land and is to be wholly performed on the land. It is a temporary lease made by him, as the owner of real estate, for the storage of merchandise and the moorage of vessels. Unlike any maritime contract, it begins, ends, and is completely fulfilled on the land. It bears no closer relationship to commerce than do the contracts of the warehouseman, the stevedore and the shipwright.

The wharf, pier or bulkhead, is as much a tenement or building as is the warehouse. One is as much real estate as the other. The sole difference between them is that the wharf is built out into the water and has no roof. The primary use of a wharf is for a *temporary* warehouse for goods that are to be shipped or that have been unshipped.

Its use as a moorage or anchorage of vessels is merely an incident of the other employment.

And the contract is one and the same contract in respect both of cargo and ship. The wharfinger's rights and his obligations are the same to the vessel and to the merchandise.

It is a contract that has nothing to do with any voyage at sea. Because it is either fulfilled before

the voyage begins, or its performance does not begin till after the voyage has been completed.

It has nothing to do with the equipment or the reparation of vessels. The wharf is used by vessels only as a convenience to ship or to deliver their cargoes.

"A wharf is a space of ground artificially prepared for the reception of merchandise, from a ship or vessel, so as to promote the convenient loading and discharge of such vessel."

Bouv. Law Dic.

An old statute of the State of New York, reads as follows: "when any ship or vessel shall have laid twenty-four hours at any wharf, and the master or owner refuses or neglects to pay wharfage, * * * * it shall be lawful for the owner or wharfinger to distrain for such wharfage *on any goods or chattels* found on board such ship or vessel."

Nicoll *vs.* Gardner, 13 Wend., 290.

"Wharfage is the money paid for landing goods upon or loading them from a wharf."

Sacramento *vs.* New World, 4 Cal., 44.

"A wharfinger is one who owns or keeps a wharf for the purpose of receiving and shipping merchandise to or from it, for hire."

Bouv. Law Dic.

See Blackstone's Commentaries, vol. 1., p. 264, and the statutes there cited.

It has never yet been contended that the storage of goods upon a wharf, either for delivery or for shipment, was a maritime contract.

Since the moorage of the vessel against the wharf is only an incident to the other service, how can it be deemed a contract of higher privilege?

(III.) There is no distinction practically between the contracts of wharving and warehousing. There is no other difference than that the bailment in one case is temporary. Both contracts are made for the storage of merchandise. Both impose the same liabilities which are those of an ordinary bailee for hire. *And both are protected by the possessory lien of the common law.*

Story on Bailment, sec., 451-3.
Kent's Commentaries, vol. 11, p. 635-42, *et n.*
Gaisede *vs.* Trent & Mersey Navigation Company, 4, Term R., 581.
Steinman *vs.* Wilkins, 7, Serg. & Watts, 466.
Rex *vs.* Humphrey, 1 McLel, and Young, 194, 195.
Platt *vs.* Hibbard, 7 Cowen., 497.
Barry *vs.* Langmore, 12 Ad. & E. 640.
Speares *vs.* Hartley, 3d Esp., 81.
Richardson *vs.* Goss, 3d Bos. & Pull., 119.

SECOND.

The Court below has no jurisdiction over the boat John M. Welch, because the maritime law gives no lien for wharfage.

(I.) The petitioners admit that the wharfinger may hold both merchandise and vessel till wharfage

shall have been paid. But they deny that the wharfinger, after he shall have permitted the vessel to sail from his wharf, can follow her wherever she may go or into whomsoever's hands, and insist upon a maritime lien.

The common law affords him ample protection. And when the common law gives a remedy, the extraordinary rule of Admiralty cannot be invoked.

"A Court of Admiralty is not needed to administer common law remedies in any form."

The Coal Barges, 3d Wall., Jr., 53.

In a case of simple contract, a maritime lien will never be imposed upon property, if the common law gives the right of possession.

(II.) Authorities need not be cited here to illustrate the difference between the lien of the common law, and of the general maritime law. It is fundamental, and profoundly affects the transferability of moveable property.

The common law lien ends with the possession of the subject chattel. The maritime lien—which is *jus in re*—follows the chattel from hand to hand, from vendor to purchaser, from mortgagor to mortgagee. It exists as long as the conscience of admiralty jurisdiction will permit.

Now, the really serious question presented in this petition is, whether the petty claims of the wharfinger shall be made an additional restraint upon the negotiability of vessel property, by conferring on them the extraordinary privilege of *jus in re*, it being admitted that the common law already affords him sufficient protection.

This Court has never been asked to decide this question.

(III). One of the serious subjects of contention between the jurisdiction of admiralty and of common law has been the subject of lien. It has been only a little less important than the question of the right of trial by jury.

The common law of England has steadfastly refused to recognize any principle that would tend to hamper trade. Says the Court, in the case of Lickbarron *vs.* Mason, 1 Smith Lead. Cas.: "In all mercantile transactions one great point to be kept uniformly in view, is to make the circulation and negotiability of property as quick, as easy and as certain as possible." It is believed that there could not be a more serious obstacle to this desirable end than the multiplication of maritime liens.

(IV). The unwillingness of this Court to enforce a maritime lien is illustrated in the much discussed subject of the rights of material men.

In the 4th Wheaton (The General Smith) it was held that a maritime lien attached against foreign vessels, but not against domestic vessels. (The Court then said that the local liens of the port might be enforced in admiralty. But the liens given by municipal laws uniformly co-exist with possession).

It has never been apparent that any distinction existed in principle between the furnishing of supplies to a domestic or to a foreign vessel. In either case, the claim arose out of the reparation and equipment of the vessel. In either case the civil law gave a privilege or special ownership. The decision was therefore much questioned. Many decisions of lower courts doubted its authority.

It was supposed that the last amendment of Rule

12, virtually reversed it. But when the subject came before the Court again, The General Smith was affirmed.

In affirming the principle laid down in the 4th Wheaton, the Court substantially said, "Maritime liens should not be multiplied. A lien is given to the material-man against a foreign vessel, *ex necessitate*. The supplies furnished must be necessary to enable the ship to complete her voyage, and they must be furnished in the absence of her owners.

The Lottawana, 21 Wall., 558.

See also, Cunningham *vs.* Hall, 1 Cliff, 51.

Upon what valid principle can it be maintained that a wharfinger, who already has a right of possession, has a maritime lien against a domestic vessel, while the material-man has no privilege whatever?

(V.) Upon this question decisions have not been harmonious.

In the District Court for the Southern District of New York, Judge Blatchford has uniformly denied the lien. So have the District and Circuit Courts of the Eastern District of Pennsylvania.

The Thomas, 7th Am. Law Rev., 381."

"The Admiralty jurisdiction is not to be invoked to enforce common law rights for which the common law has provided appropriate and efficacious remedies. I see no reason for expanding the admiralty cognizance of a demand which rests securely upon a basis of common law right, and for the enforcement of which by the wharfinger himself the common law applies an effectual remedy."

It has been denied by the District Court for the District of Michigan.

The Gem, Browne's Ad. Rep, 37.
The Asa R. Swift, 1 Newb., Ad, R., 543.
See also, The Alexr. McNeil, 20th Int. Rev. Rec., 175.

On the other hand, the lien has been enforced by the District Court for the Eastern District of New York.

The Kate Tremain, 5th Ben., 60.
The Virginia Ruland (a manuscript opinion of ch. Justice Hunt, given in June last.)

The authorities cited in the case of the "Kate Tremain," as supporting the lien, are the following:

The St. Jago De Cuba, 9 Wheat., 418.
The Ship New Jersey, 1 Peters Ad., 228.
Ex parte Lewis, 2 Gall., 483.
The Phebe, Ware, 360.
The McDonough, Gilpin, 103.

It is confidently urged that none of these cases will support a maritime lien, or justify the conclusion reached by the District Court.

In the first place, they all are adjudications in respect of disbursing assets in the registry of the Court; marshalling claims to surplus funds, and paying each in its order. In the second place, as far as the subject of lien is discussed in any of these cases, it is the *common law* lien and not the *maritime* lien for wharfage.

In the 9th Wheat., 418, this Court says, that "the claim for wharfage was good against all the world, but the credits in the account will more than cover it."

In Peters' Ad. R., Vol. 1, p. 228, the Court only says, "wharfage has been allowed out of proceeds, as the wharfinger *might detain* the ship until payment."

In the case of the Phebe, Ware, p. 366, the Court says: "I admit that the owner of a wharf has generally a lien on the vessel for wharfage. * * * * * It cannot be admitted that the wharfinger, by permitting her to lie at his wharf, withdrew her from the custody of the law or the possession of the Court. His lien for wharfage, admitting it to exist, was not one which could be enforced by a detention of the vessel, but only by an application to the Court, and that not in exclusion, but in concurrence with other liens standing in the same degree of privilege."

In *ex parte* Lewis, 2 Gall., 473, the Court says: "The lien for wharfage seems to me fully supported by the doctrines of the *common law* * * *If it had been due for a former voyage, or the wharfinger had parted with possession, the case would have been entirely altered.*"

(The cases cited by Judge Story—Naylor *vs.* Mangles, 1 Esp., 109; Spears *vs.* Hartly, 3 Esp., 81; Saville *vs.* Burchard, 4 Esp., 53, were all adjudications in favor of a *common law lien.*)

In The McDonough vs. Johnson, Gilpin's R., the Court holds: "It was long since decided in this Court by Judge Peters, that wharfage is allowed out of proceeds, as the wharfinger might detain the ship until payment; in other words, that a wharfinger has a lien on the vessel for his wharfage. In this case it has not been questioned, but it has been insisted that the lien was lost by the loss of the possession of the schooner. *It is certainly true that when the possession of a chattel is voluntarily given up* * * * *the lien is abandoned.*"

Is it not manifest that the foregoing authorities maintain for the wharfinger the possessory lien only? The language quoted is inconsistent with the meaning of a maritime lien. It refers to possession as the sole criterion of lien.

Moreover, where funds are in the registry of an Admiralty Court, he who had a common law lien in the subject sold, will be preferred in the distribution of the proceeds of sale, to a mere creditor. And this is the effect of the foregoing decisions.

Schuchardt *vs.* Babbidge, 19th How., 239.

It is believed that, prior to the decision in The Kate Tremain, no authority can be found either for the proposition that wharfage is a maritime contract; or for the proposition that the wharfinger has a maritime lien upon merchandise or vessel.

(VI.) Attention is called to the fact that the boat "John M. Welch," is a *domestic* craft; and that she has no sails or masts, or other means of self locomotion.

THIRD.

Although wharfage be a maritime contract, the Court of Admiralty cannot proceed, *in rem*, to enforce, in such a cause, a local lien.

(1.) The law of the State of New York gives no lien to the wharfinger against the vessel although it does give him a lien against the cargo. (See the Law of 1870, Secs. 1 and 2.)

This law declares a liability; it does not create a lien.

Wick *vs.* The Samuel Strong, 6 McLean, 587.
The Laurel, 1 Newb., 269.

(2.) In the case of The General Smith, this Court held that *if the contract was maritime*, an Admiralty Court might enforce a local lien *for supplies and repairs*. No authority, nor even dictum of this court extended the remedy to contracts that were not maritime, or to other persons than material-men.

In 1844, the 12th Rule of Admiralty was drawn, expressly giving to material-men the benefit of enforcing in Admiralty local liens.

The principle seems to have been admitted reluctantly, and as an exception to the well-defined rule that Common Law Courts are not to enforce Admiralty remedies, and Admiralty Courts are not to assume common law functions.

But in the case of Maguire *vs.* Card (21 How.), this Court expressly overruled the case of The General Smith upon this subject, and announced its intention to revoke the rule.

"We have at this term amended the 12th Rule of the Admiralty, so as to take from the District Courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs which had been made upon the authority of a lien given by State laws, it being conceded that no such lien existed according to admiralty law, thereby correcting an error which had its origin in this Court in the case of The General Smith, applied and enforced in the case of Peyroux *v.* Howard (7 Pet, 324), and afterwards partially corrected in the case of the Steamboat New Orleans *vs.* Phoebus (11 Pet., 175, 184).

In this last case the Court refused to enforce a lien for the master's wages, though it had been given by the local law of the State of Louisiana, the same as in the case of the repairs and supplies of the vessel.

We have determined upon leaving all these liens depending upon State laws and not arising out of the maritime contract to be enforced by the State Courts."

In 1859, the rule was amended, and the right to enforce local liens, apparently, no longer admitted. Then came the case of the Steamer St. Lawrence (1 Black's R.), where, in speaking of Rule 12 and its history, the Court used this language (the case was in behalf of a material-man):

"The State lien was enforced, not as a right which the Court was bound to carry into execution upon the application of the party, but as a discretionary power which the Court might lawfully exercise for the purposes of justice where it did not involve controversies beyond the limits of Admiralty jurisdiction. In many of the States, however, the laws were found not to harmonize with the principles and rules of the maritime code; certain conditions of forms and proceedings are usually required to obtain a lien. * * * * These conditions differ in different States, and if the process *in rem* is used, wherever the local law gives the lien it will subject the Admiralty Court to the neccessity of expounding the varying lien laws of every State, and carrying them into execution and that, too, in controversies where *the existence of the lien is denied*, and the right depends altogether on a disputed construction of a State statute. * * * Such duties and powers * * * are entirely alien to the purposes for which the admiralty power was created, and formed no part of the code of laws which it was established to administer.

The proceedings therefore, *in rem*, upon the ground

that the local law gave the lien where none was given by the maritime code, was found upon experience to be inapplicable to a mixed form of government. It was found to be inconvenient in most cases, and absolutely impracticable in others and the rule which sanctioned it was therefore repealed." (pp. 530-1.)

This language seems explicit enough to justify the inference, that the enforcement of local liens in admiralty, has no other authority than a rule of this Court; that the District Courts have no jurisdiction to enforce such liens unless pursuant to a rule of this Court, and that such liens will never be recognized except in behalf of material-men.

In 1872, Rule 12 was again amended, and this Court held (21 How., 579) that the effect of the amendment was to restore to the *material*-man, the benefit of the procedure *in rem* to enforce a local lien, if any existed. Still the Court very explicitly held, that the exercise of this remedy was a matter of discretion; that it depended entirely upon a rule of Court, and that independently of the rule, it did not exist at all.

The Lottawana (21 How. 579, 580).

The dissenting opinion of Mr. Justice Clifford strongly maintained the opinion given upon this subject in the case of the St. Lawrence already quoted. (21 How., 602–5).

(III). It is a fair commentary upon the dictum in the case of the St. Lawrence, that within six years past, the legislature of the State of New York has passed no less than five wharfage laws.

(IV.) If the Admiralty Court has power to enforce any local lien given by State laws, provided the con-

tract is maritime, can it not enforce common law liens also? Can it not enforce liens that are created by special contract?

It is difficult to see why this cannot be done, provided the power of the Admiralty Court exists independently of rule, and as an incident of the contract simply.

Ex parte McNeil, (13th Wall.) is not against this point, because in that case the contract—one of pilotage—was maritime, and the lien enforced was maritime. Moreover Federal legislation, (acts of 1789 and 1837), adopted the state pilotage laws.

FOURTH.

But the Admiralty Court should not enforce a proceeding *in rem* for wharfage, pursuant to the law of the State of New York. This law is unconstitutional.

(I.) It seems clear that the Act of 1870, (see our petition), gives no lien against vessels, although it does give a lien against merchandise. And the District Court does not, apparently, otherwise construe it. But the Court has held in a cause precisely similar to this one (The Ann Ryan, 7th Ben.) that wharfage being a maritime contract, and the wharfinger having a maritime lien, the statute of the State can be invoked to determine the amount of the lien it being presumed that a wharfage rate fixed by the local law is a reasonable compensation for the use of wharves.

(II.) In 1813, a wharfage law was passed by the Legislature of New York, for all ships and vessels in

the port of the City of New York. Section 12, of the Act determined the rate of toll, while section 17 provided the remedy for its enforcement, which was distraint upon the merchandize carried by the vessel in default.

Laws of New York, 1813.
Nicoll *vs.* Gardner, 13 Wend., 290.

In 1860, another wharfage law was passed which imposed a higher rate of toll, and also subjected the ship or vessel, that was in default, to a specific lien.

Section 2, Laws of 1860, (p. 416.)

But this Statute expressly exempted from its operation canal-boats and barges:

Section 6, Laws of 1860, (p. 418.)

The law of 1870, which is set forth in our petition, increased the rate of toll, did not provide a specific lien against the vessel, although it did against the merchandize she carried, and subjected canal-boats and barges to the new rates of wharfage. It also contained this exceptive clause. "*Except that all canal-boats navigating the canals in this State shall pay the same rates as heretofore.*"

This exception refers to the Act of 1813, already cited.

The distinction thus made between boats navigating the waters of New York State, and boats of the same tonnage and description which reach the port through foreign waters is that of five to one. If the barge "John M. Welch," which was plying on the Delaware Canal, had came to the port of New York through the Erie Canal, the toll for the wharving of her would have been one-fifth the charge she is now held for.

Under whatever name this distinction is concealed, it is now urged to be a discrimination between the property of citizens of different States, and to be unconstitutional and fundamentally wrong.

Though the amount involved in the cause now pending is small, the aggregate of claims for wharfage based on this discriminating toll is very large.

(III.) No question is made against the right of the wharfinger to collect reasonable tolls for the use of his wharf. This court has repeatedly held that such a toll is not a "duty of tonnage" in the sense forbidden by the constitution. Neither is it a regulation of commerce foreign or interstate, any more than pilotage or quarantine laws. Where wharfage tolls are fixed by law, the same concession must be made. They are compensation for the use of property merely.

State tonnage tax cases, 12 Wall. 204.
Cannon *vs.* New Orleans, 26 Wall., 577.

But carriers have the right to insist that these tolls shall be uniform. When they cease to be uniform, they are no longer mere compensation to the wharf owner.

(IV.) The wharf owner is in some sense a public servant. He makes use of public navigable waters for private gains. He is permitted to do this because of the utility, not to say the necessity, of wharves. At the same time he owes the public a duty. Any vessel can moor against an unoccupied wharf. The wharfinger has no choice whatever as to what vessels shall make use of his property. He can give no preference, to boats or barges plying on the waters of the State of New York exclusively.

What he cannot do directly, he cannot do indirectly. He cannot, in other words, by making arbitrary distinctions in his rate of tolls, practically exclude certain boats from his wharf. Reasonable compensation for wharving a boat of 100 tons burden is the same thing whether the boat is owned in Buffalo, or in Philadelphia.

Now it does seem very clear, that what the wharf owner cannot himself do, *the State of New York cannot help him to do.* And this follows from the same argument.

The State has the undoubted right to fix wharfage tolls, and the exercise of this right depends entirely on the fact that the wharfinger is a public servant. But it is submitted that in the exercise of this right the state cannot enable him to commit an act of injustice which he could not otherwise have done.

It is an undeniable fact that a canal boat or barge of 200 *tons burden, coming to New York, from Philadelphia, would be obliged to pay five times more toll for wharfage, than if she had come from Buffalo.*

It is equally true that the only reason for this distinction is the fact that the ports of shipment are in different states.

The Federal constitution will not tolerate a law which makes such a distinction.

"Congress shall have power to regulate commerce with foreign nations, *among the several states*, and with the Indian tribes."

Art. 1. Sec. 8.

"No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce to the ports of one state over those of another."

Art. 1. Sec. 9.

"No state shall lay any duty of tonnage."

Art. 1. Sec. 10.

"*The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.*"

Art. IV. Sec. 2.

(V). This Court has decided that article 4 gives to every citizen amongst other things the right "to acquire personal property; to take and hold real estate; to maintain actions in the Courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

Ward *vs.* Maryland, 12 Wall, 420.

There can be no doubt that if the Act in question provided that canal boats and barges owned by *citizens* of the state of New York should pay one-fifth the wharfage rates exacted by law from boats owned by citizens of other states, it would be unconstitutional because repugnant to Art. 4. The language of the Court (12 Wall. 430 and many other cases) removes any doubt about it.

But the same thing is now done under a different name. It is fair to presume that boats which navigate the waters of the state of New York, exclusively, are owned by citizens of that state, but a presumption is not needed.

The repugnancy of the Act to Art. IV can be made out absolutely. If a barge which plies on the Delaware canal between Philadelphia and New York pays five times as much wharfage in the port of New York, as the same boat would pay if she came from Buffalo *via* the Erie canal, or from Albany *via* the Hudson River, the carrier would be obliged to charge upon the foreign merchandize, a freight

proportionally higher than the domestic carrier would charge.

It is nothing to the purpose that citizens of New York own both of these boats—or own the boat that plies on the Delaware canal. *Because this increased freight charge would necessarily be borne by the shippers of the merchandize,* and these persons would of course he non-citizens of the state.

So the discriminating toll would become either an impost upon goods brought from a foreign state into New York, or it would be a tax upon non-citizens for the use of a domestic port.

The act is therefore not only repugnant to Art. 4. but it is a regulation of inter state commerce, impliedly repugnant to Art. 1.

The petitioners herein are citizens of New York. Their boat is a domestic vessel, but how does this fact control the subject, if on every ton of coal which the boat brings to New York from Philadelphia, an increased freight charge is made, *because* the merchandize is brought from Philadelphia?

If once the *right* is admitted for a state to make a discrimination nominally in favor of citizen as against non-citizen carriers, there is no limit of degree to which it may not be carried.

The exercise of any such privilege is either unconstitutional or it is not.

If the right exists why cannot a state practically exclude inter state craft from its wharves by imposing vexatious tolls?

Crandall *vs.* State of Nevada, 6 Wall. 46.

"Questions of power do not depend upon the degree to which it may be exercised, if it may be

exercised at all, it must be exercised at the will of the power in whose hands it is placed."

Brown *vs.* Maryland, 12 Wheat., 439.

If the State of New York has the constitutional right to lay discriminating tolls upon Pennsylvania, Delaware and New Jersey barges, it has the power to exclude from its ports all that portion of inter-state commerce which is transported in those boats.

Ward *vs.* Maryland, 12 Wall., 418.
State freight tax cases, 15 Wall., 232.
Osborne *vs.* Mobile, 16 Wall., 479.
Passenger cases, 7 How., 402.
State tonnage cases, 12 Wall., 204.
Woodruff *vs.* Parkham, 8 Wall., 139.
Cannon *vs.* New Orleans, 20 Wall., 577.

(VI.) It may be said in support of this law, that the rate of tolls laid upon shipping by the act of 1870 is a reasonable one; that it applies to all vessels indiscriminately, except domestic craft, and that a state has the right to favor its own tonnage or its own internal commerce in this way. The Erie Canal, for instance, has been a great burden upon the State, and to encourage commerce upon that thoroughfare is a legitimate act of State sovereignty.

This position was taken by the Court in the case of "the Ann Ryan," 7 Ben. It was the argument advanced in behalf of the State of New York in the great case of Gibbons *vs* Ogden.

But do not the decisions of this Court, from the 9 Wheaton to the present, effectually refute this argument?

In respect of these questions, this Court has unvaryingly held, that the motive of the Federal Con-

stitution was "*entire commercial equality.*" Any state legislation which tended to establish inequality in commercial intercourse, no matter upon what pretext, no matter how trivial the occasion—was unconstitutional.

It is manifest that inequality of privileges or immunities can as well be brought about by favorable legislation in behalf of citizens of the state, as of hostile legislation against non-citizens.

The undeniably safe proposition is that there must be no discrimination in state legislation of any kind or upon any pretext in favor of its own citizens, in matters of interstate commerce.

In respect of no subject could this be more palpable than the use of wharves and piers.

These encroach upon and become an incident of public navigable waters. Over these waters the state of New York may have a right of sovereignty, if within her territorial limits.

But citizens of New York have no property in them, any more than citizens of Pennsylvania.

Their use is common to all, and there can be no exclusive property in them.

During the past fifteen years the commerce transacted by means of such craft as the barge "John M. Welch," at the port of New York, has steadily increased. It is now very large. Perhaps the tonnage of such boats for one-half of the year, is as great as that of foreign shipping.

Of this tonnage a great part is tributary of the Erie Canal and the Hudson River. A very large part is tributary of the Delaware and Chesapeake Canals, bringing the freight shipped, or transhipped

from Baltimore, Philadelphia, Amboy, and intermediate ports.

The discrimination of wharfage tolls, between two branches of commerce, that are carried on by the same class of boats, is vexatious and unjust. It is, or it may become, a serious check upon the freedom of trade.

It is submitted in conclusion that the District Court ought not to proceed against the barge "John M. Welch," to enforce a claim for wharfage under the law of the State of New York.

EDWARD D. McCARTHY,

For Petitioners.

Benedict

Supreme Court of the United State

In the Matter of the Petition of

JAMES T. EASTON AND JAMES McMAHO

FOR A WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, SITTING AS A COURT OF ADMIRALTY.

PETITION AND EXHIBIT

FILED AFTER LEAVE OBTAINED.

EDWARD D. McCARTHY, ESQ.,
Proctor for Petitioners,
TRIBUNE BUILDING,
New York City.

NEW YORK
National Printing Company, 13 Chambers Street.
1876.

1

To the Honorable, the Justices of the Supreme Court of the United States:

In the matter of the petition of JAMES T. EASTON and JAMES McMAHON, Citizens of the State of New York, for a writ of prohibition to the United States District Court, sitting in and for the Eastern District of New York, as a Court of Admiralty. 2

Your petitioners respectfully show:

1st. That they are citizens of the State of New York, and are engaged in the business of transportation of merchandise, having their place of business 3
in the City of New York.

2d. That heretofore, to wit, on the 20th day of October, 1876, in the District Court of the United States for the Eastern District of New York, sitting as a Court of Admiralty, and exercising maritime jurisdiction, a libel was filed by and on behalf of certain persons, likewise citizens of the State of New York as your petitioners believe, and claiming to be owners or lessees of a certain pier or wharf of the Port of New 4
York, in an alleged cause of wharfage and dockage, wherein process of arrest and condemnation of a canal boat or barge called the "John M. Welch," was prayed for.

A copy of said libel marked "A" is annexed to this petition, and made a part hereof.

3d. That on said 20th day of October, 1876, the said District Court did, pursuant to the prayer of said libel, issue or direct to be issued, its process of

5 attachment *in rem* against the said canal boat or barge, and did publicly cite all or any persons who had interest in the said canal boat or barge to appear on a stated term of said court, in said court, and show cause if they had any, why the boat should not be condemned and sold to answer the prayer of said libel.

4th. That your petitioners then were and now are sole owners of said boat or barge. That said boat
6 having been seized on the attachment, and held, your petitioners on the day of the return of process, did appear by their Proctor, and duly authorized agent, made claim to said boat or barge, gave stipulation approved by said court for her value, and obtained leave to file their answer to the allegations of the libel aforesaid, or such exceptions as they might have to the same and to the proceedings had, pursuant thereto. Afterwards, your petitioners ob-
7 tained leave to file and did file an amended answer and exceptions to said libel, which answer containing exceptions, is annexed to this petition, marked "B," and forms a part thereof.

5th. That the said canal boat or barge, "John M. Welch" is a craft or vessel of about two hundred and nine tons carrying capacity. She is without sails or self motive power of any kind. She cannot be used independently of extra motive agency.

8

On the 20th day of October, 1876, the day when the aforesaid process issued against her, she had completed a trip from the City of Baltimore, bringing a cargo of coal, and forming one of a tow or line of barges, all under the lead of a steam tug, which made the trip from Baltimore to New York by way of the Chesapeake and Delaware Canal, the Delaware River, and the Delaware and Raritan Canal. She reached the port of New York on or about the 10th

October, 1876. She took wharfage at the pier or wharf, at the foot of Bank Street, North River, and remained there till the 20th day of the same month. A bill of wharfage rendered by the libellants or their agent in the cause aforesaid is annexed to this petition marked, "C," and forms a part hereof. 9

6th. That your petitioners now are and for many years have been the owners of a large number of such boats or barges as the "John M. Welch," all of them of the same description and character, and of the same tonnage. Your petitioners have been engaged in the aforesaid business of transportation for nearly twenty years. 10

Some of their boats during this time have plied between the ports of Buffalo and of New York, by way of the Erie Canal and the Hudson River; others have plied on the Hudson River, exclusively, while others, though much the largest number, have plied between Baltimore, Philadelphia, and New York, by way of the Delaware and Raritan Canal. But all these boats have been and are of the same class, and the same boats have never exclusively been employed on the same waters. It has been and still is a matter of convenience simply, whether the same boat should be sent to Baltimore or to Buffalo. 11

From 1870 to 1874, the number of boats or barges thus owned and employed by your petitioners was about three hundred each year. From 1874 to the present time, the number has been about one-half as large, each year. 12

Previous to the year 1870, and indeed previous to the year 1875, (for, until the year 1875, the distinction of rates of wharfage now complained of was not enforced practically, or rather generally,) the wharfage on all these boats or barges at the port of New York for the use of New

13 York or Brooklyn wharves, was fifty cents or seventy-five cents per day for each boat, accordingly as the boat had inside or outside wharfage. No question was made as to where the boat or barge came from. Her owners were required to pay only fifty cents or seventy-five cents per day for use of wharf to the wharf owners. At the present time, and always heretofore, no greater sum is or has been demanded for wharfage of canal boats or barges plying
14 on the canals and rivers of the State of New York, than fifty cents or seventy-five cents per day for each boat.

At this rate, wharfage of the boat "John M. Welch," aforesaid, for the period of ten days, would have been not more than five dollars or seven and one-half dollars, which is about one-sixth of the amount claimed in the libel aforesaid.

15 No greater wharfage than five dollars or seven and one-half dollars for ten days wharfage, would have been demanded of her owners, in the matter of these proceedings against the "John M. Welch," as your petitioners from their own experience know, if the said barge had on the 10th October, 1876, completed a voyage from Buffalo to New York, instead of from Baltimore to New York.

In respect of your petitioners' own business, this
16 distinction of wharfage rates, so far as any accurate calculation can be made, and speaking from the data given by the business transactions of the year 1870–1874, would not be less than five thousand dollars per year. In the years 1875 and 1876, the distinction to be estimated would be less, because our business was lighter then than in the preceding years. For the coming season, this distinction may be greater or less than five thousand dollars.

Your petitioners do not and cannot speak with accuracy in respect of this distinction of rates, but they verily believe that the foregoing estimate is not an exaggeration of the fact. 17

As regards, however, the subject of any single lien, sought to be enforced in a Court of Admiralty, the excess of wharfage on any one canal boat or barge, would seldom, if ever, be fifty dollars.

7th. That the Statute of wharfage and dockage of the State of New York referred to in the libel aforesaid, is as your petitioners are informed and believe, the Statute enacted on the 6th day of May, 1870. 18

This law was subsequently amended in the years 1872, 1875, and 1876, but its essential feature of distinction of wharfage between canal boats plying on the waters of New York State exclusively, and all other canal boats and barges, has not been changed.

A true copy of said statute, as your petitioners verily believe, is annexed to this petition, marked "D," and forms a part hereof. 19

That the "same rates as heretofore," which are required by said statute to be paid by "all canal boats navigating the canals of this State" are the rates of fifty cents and seventy-five cents per day for each boat, as is hereinbefore set forth, as your petitioners verily believe.

20

8th. That the District Court of the United States, sitting in and for the Eastern District of New York, as a Court of Admiralty, as your petitioners are informed and believe, and now respectfully represent, enforces a lien against canal boats or barges, in causes of wharfage and in favor of wharf owners, under the provisions of the said law of the State of New York hereinbefore set forth on one or both of the two following grounds.

21 1st. That the law of the State of New York gives a lien enforceable in admiralty for wharfage at the rate of two cents for every ton up to two hundred tons burden, for each day's wharfage, against all canal boats except those which navigate the canals of the State of New York.

2d. That there is a general maritime lien for
22 wharfage against canal boats enforceable, in admiralty, the amount of which lien is to be determined by the law of the State of New York. As to canal boats navigating the Erie canal, the amount of lien, as so determined, is fifty cents per day; as to the same kind of craft, navigating the Delaware and Raritan canal it is from three and one-half to four dollars per day.

23 A lien has been enforced by the Honorable Court, aforesaid, for wharfage against the canal boat "Ann Ryan", on a state of facts, as your petitioners believe, identical with the facts hereinbefore set forth. The proceedings therein were under and to enforce the provisions of the same statute, and the same rate of wharfage as in the case now pending. Reference is made to "The Ann Ryan", 7th Benedicts R., p. 20.

24 And your petitioners finally and respectfully urge that if they have grievance at all, that can or ought to be redressed, no other remedy than by writ of prohibition is available or possible to them.

Your petitioners being citizens of the same state as the libellants, in the cause now pending (as would be the fact probably in every case of wharfage), cannot ask equitable relief by original action in any Federal Court.

The amount involved in the cause now pending being less than fifty dollars (as would be the fact probably in every case of wharfage of a canal boat) there is no appeal open to your petitioners if their boat should be condemned by the Honorable Court before which the proceeding is pending; and that it would be condemned upon final hearing, your petitioners can have no doubt, in view of the decision of the same Honorable Court in the case of the "Ann Ryan." But the amount actually involved to your petitioners, if presented in one cause of appeal, would be large enough to give the Supreme Court of the United States jurisdiction. 25 26

Your petitioners are advised that they ought not to apply to the Courts of the State of New York for relief against proceedings which wharf owners contemplate taking in a Federal Court, much less against proceedings already begun in a Federal Court.

Should the Honorable Justices of the Supreme Court, grant your petitioners' motion, herewith submitted, for an alternative writ of prohibition, to the said District Court, sitting as a Court of Admiralty in the cause of Charles P. Brook, *et al.*, versus the "John M. Welch," her tackle, furniture, etc., your petitioners, upon the return to the same, and argument on the merits involved, will submit in their own behalf, the following propositions, the contrary of which they believe to be error. 27 28

1st. That in a cause of wharfage there is no lien given by the general maritime law.

That the laws of the State of New York give no such lien, and therefore the District Court of the United States, for the Eastern District of New York, as a Court of Admiralty, cannot proceed *in rem*, to enforce a wharfage claim.

29 2d. But if there is a general maritime lien, that the law of the State of New York, cannot be invoked to determine the amount of such lien. The law of the State of New York, enacted May 6, 1870, and its amendments, is repugnant to the Constitution of the United States, in so far forth as it makes distinction in wharfage rates, between canal boats plying on its own waters, and all other canal boats.

30 A law which makes such distinction, does not impose on vessels for use of wharves, a mere compensatory payment. A compensatory payment, merely, must be general and uniform. The excess of wharfage demanded of all other canal boats than those navigating New York waters, is a duty of tonnage.

This law is, moreover, such restriction of commerce, as a State has no right to make, even in the absence
31 of Federal legislation.

It is also repugnant to the Federal constitution, because its practical effect, as was its undoubted intention, is, to draw a distinction between small craft owned by citizens of the State of New York, and the same kind of vessels owned by citizens of other States, in favor of the former.

Respectfully submitted.

EDWARD D. McCARTHY

Proctor.

32

JAMES T. EASTON.

JAMES McMAHON.

Southern District of New York, ss. :

Jas. T. Easton,

having been first duly sworn, says, that he is one of the petitioners herein; that he has read the foregoing petition, and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

Jas. T. Easton

Sworn to before me, this
16 day of December, 1876.

A.

To the Honorable CHARLES L. BENEDICT, Judge of the District Court of the United States for the Eastern District of New York.

The libel of Charles B. Brooks and——Parker, composing the firm of Charles B. Brook & Company, against the barge or vessel called the "John M. Welch," her engines, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of wharfage and dockage, civil and maritime, alleges as follows:

First.—That at the times hereinafter mentioned, and before and after, the Libellant, being the lessee, and in possession of the wharf or pier at or near the foot of Bank Street, North River, in the City of New York, and the slip or basin appertaining thereto, and, in accordance with the laws of the State of New York, in such behalf made and provided, authorized to collect wharfage and dockage from vessels lying at said wharf or pier, or within said slip or basin, did then and there furnish to and for the said vessel a berth, which the said vessel did use and occupy, from and including the 9th day of October, A. D. 1876, to and including the 20th day of October, A. D. 1876. Whereby, there became due and owing to the said *Libellant*, from the said vessel, thirty-four and $\frac{20}{100}$ dollars, for wharfage and dockage, as aforesaid, payment whereof was duly demanded of and from said vessel.

Second.—That the said amount is a maritime lien upon the said vessel, her engines, tackle, apparel, etc., and is a lien thereupon by the laws of the State of New York.

Third.—That neither the masters or owners of the said vessel have paid to the Libellants the said sum of money, or any part thereof, but have hitherto wholly neglected and refused to pay the same, and still neglect and refuse so to do; And that the sum of thirty-four $\frac{21}{100}$ dollars, with interest, is still due the Libellants, in the premises.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

Wherefore, the Libellants pray that process in due form of law, according to the course of this Honorable Court, in causes of admiralty and maritime jurisdiction, may issue against said vessel, her tackle, apparel, and furniture. And that all persons having or claiming any right or interest in said vessel, her tackle, apparel and furniture, may be cited to appear and answer upon oath the matters aforesaid; and that this Honorable Court may be pleased to decree payment of the demands and claims of the Libellants aforesaid, and that the said vessel, her engines, tackle, apparel and furniture, may be condemned and sold to pay the amount due to the Libellants in the premises, with interest and costs, and that the Libellants may have such other and further relief in the premises as in law and justice he may be entitled to receive.

CHARLES B. BROOKS & CO.

By PATRICK KEENAN.

Sworn to before me, this 20th day of October, 1876.

B. LINCOLN BENEDICT,
U. S. Commissioner.

JOHN J. ALLEN,
Proctor for Libellants.

41

B

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

CHARLES B. BROOK and —— PARKER,
Libellants,
against
The Barge or Vessel "J. M. WELCH," her tackle, apparel, &c.

42

To the Honorable Charles L. Benedict, Judge of the District Court of the United States for the Eastern District of New York:

43

James F. Easton and James McMahon, merchants, of the City of New York, intervening for their interest in the canal boat or barge "J. M. Welch," her tackle, furniture, &c., to the allegations of the libel, except to the same, and say that process of condemnation should not issue against the said boat, "J. M. Welch," in this cause of wharfage and dockage, because:

44

1st. No maritime lien exists against the said boat because of the matters set forth in the said libel.

2d. No lien is given for wharfage against boats or vessels by any law of the State of New York.

3d. The law of the State of New York referred to in said libel, as giving a lien for wharfage against boats and vessels, and which law was passed, as your claimants and intervenors believe, on the 6th day of May, 1870, is void and unconstitutional, for the following reasons:

45 1st. It imposes a restriction on commerce.

2d. It imposes a duty of tonnage on all vessels of the character and description of the barge "J. M. Welch."

3d. It draws a distinction which is practical and effectual on all such boats or barges as the "J. M. Welch," owned by persons who are not citizens of the State of New York, and the same class of boats
46 owned by citizens of the State of New York, which is done under cover of a nominal distinction between boats or barges plying on the canals or between ports of the State of New York, and the same class of boats plying between any port of the State of New York and the port of another State. And for answer to the allegations of the said libel, say:

1st. They have no knowledge or information on
47 which to form a belief that the libellants herein are, or at any time mentioned in the libel were, lessees of the wharf at or near the foot of Bank Street, North River, in the City of New York.

2d. While they admit, that from the 9th to the 20th days of October, 1876, their barge or boat, the "J. M. Welch," was given inside wharfage at the wharf aforesaid, for which wharfage these claimants, who then were, and now are the owners of said boat,
48 should pay a reasonable compensation to whomsoever said compensation is legally due, they deny that for the use of said wharf for the period aforesaid of eleven days, the sum of Thirty-four dollars and twenty cents ($34.20), claimed in the libel, is a reasonable and just compensation.

They further say, that fifty cents a day for the use of said wharf by said boat is a reasonable and just compensation, and the only sum that can be reason-

ably and lawfully claimed, which last named sum these claimants believe to be a reasonable compensation for the wharfage of a canal boat or barge of the character of the "J. M. Welch," because it had been the price invariably charged for the wharfage of such boats for many years previous to the year 1870, and still is and ever since has been the rate of wharfage per day of the same class of boats as is the "J. M. Welch," "which were engaged in navigating "the canals of the State of New York, and were em- "ployed upon its rivers."

Wherefore, your claimants ask that the libel herein be dismissed, with costs.

EDWARD D. McCARTHY,
Proctor for Claimants,
Tribune Building, N. Y. City.

Southern District of New York, ss.:

Jas. T. Easton being duly sworn, says: I am a member of the firm of Easton and McMahon, New York City, claimants herein. I have read the foregoing answer, and the same is true.

Jas. T. Easton

Sworn to before C.
Notary Public
N.Y. County

NEW YORK, *Oct. 20th*, 1876.

BARGE JOHN M. WALSH.

To CORPORATION DOCKS AND SLIPS *Dr.*

For Wharfage at Dock and Pier foot Bank St., N R.

9 Days Inside	$3.60	$32.40
1 " Outside		1.80
Storage		$34.20

Received Payment for

.....Dock Master.

Distress will be made according to law, if this bill is not paid when presented.

Office, foot

53

D.

The Bill passed at the last session of the Legislature, increasing the rates of wharfage in this city and Brooklyn, was signed by Governor Hoffman, on the 6th of May, 1870, and it became a law on that day. The following is the Act as it has been issued from the office of the Secretary of State:

54 SECTION 1. It shall be lawful to charge and receive, within the cities of New York and Brooklyn, wharfage and dockage at the following rates, viz.: From every vessel that uses or makes fast to any pier, wharf or bulkhead, within said cities, or makes fast to any vessel lying at such pier, wharf or bulkhead, or to any other vessel lying outside of such vessel, for every day and part of a day, as follows: From every vessel of 200 tons burden and under, two cents per ton, and from every vessel over 200
55 tons burden, two cents per ton for each of the first 200 tons, and one-half of one cent per ton for every additional ton, *except that all canal boats navigating the canals in the State*, and vessels known as North River barges, shall pay the *same rates* as heretofore, and the class of sailing vessels now known as lighters shall be one-half of the first above rates; but every other vessel making fast to a vessel lying at any pier, wharf or bulkhead within said cities, or to
56 another vessel, outside of such vessel, or at anchor within any slip or basin when not receiving or discharging cargo or ballast, one-half of the first above rates; and no boat or vessel shall pay less than fifty cents for a day, or part of a day; and from every vessel or floating structure, other than those used for transportation of freight or passengers, double the first above rates; and *every vessel that shall leave a pier, wharf, bulkhead, slip or basin without first paying the wharfage or dockage due thereon, after being*

demanded of the owner, consignee or person in charge of the vessel, shall be liable to pay double the rates established by this Act.

SEC. 2. It shall be lawful for the owner or lessee of any pier, wharf or bulkhead within the cities of New York and Brooklyn, to charge and collect the sum of five cents per ton, on all goods, merchandise and materials remaining on the pier, wharf or bulkhead, owned or leased by him, for every day after the expiration of twenty-four hours from the time such goods, merchandise and materials shall have been left or deposited on such piers, wharf or bulkhead, and the same shall be a lien thereon.

SEC. 3. All acts and parts of acts inconsistent with the provisions of this Act are hereby repealed.

Whereas a Deed
real estate
Ben G

1 Not mandatory
2 Seal not given
no lien
3 If it was acknowledged
was not given